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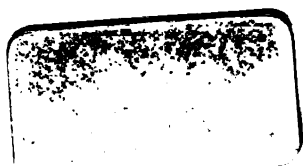
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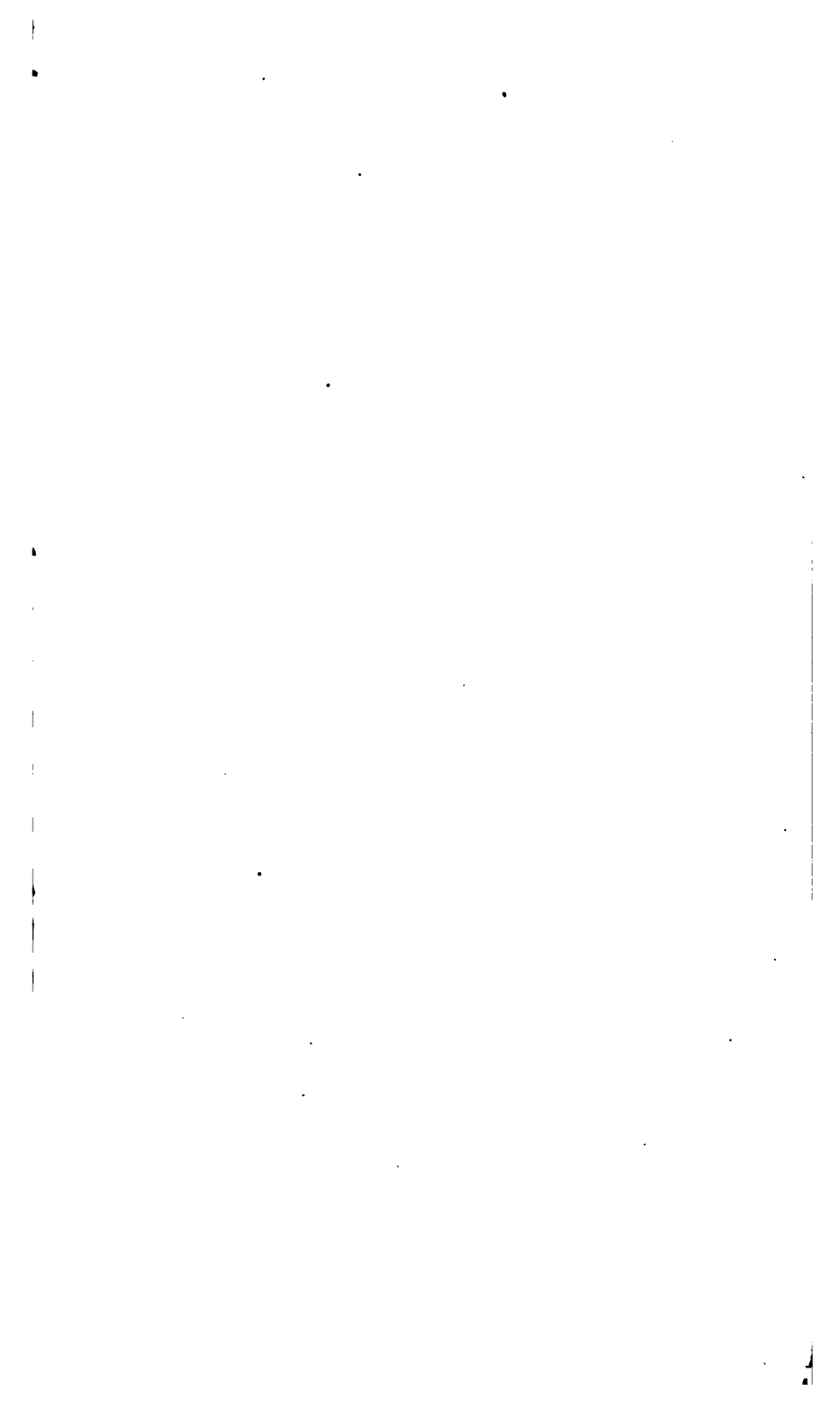
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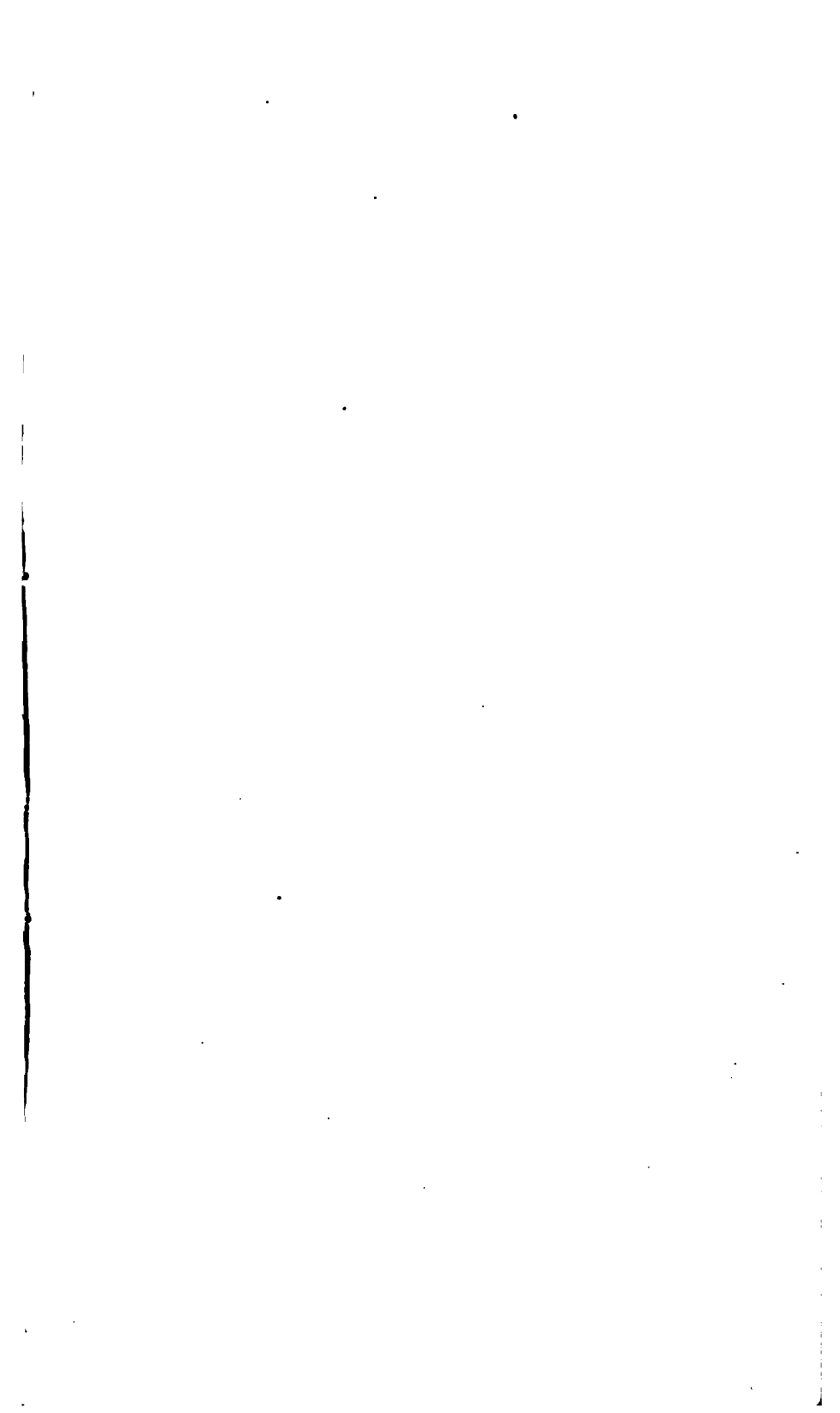














THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1866.**

COMPILED AND ANNOTATED

By A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENT,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

Vol. XLI.

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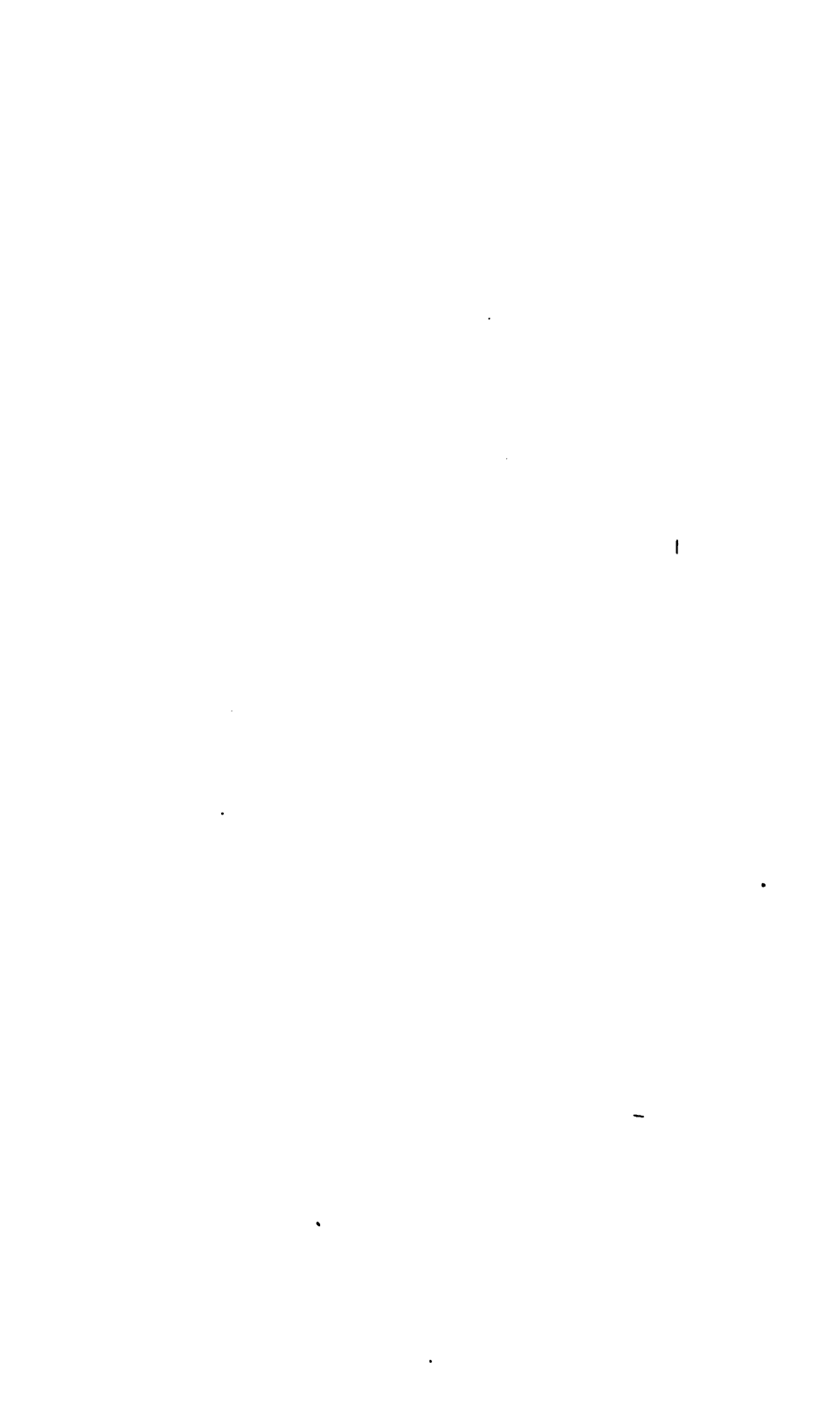
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AMERICAN DECISIONS.
VOL. XLI.



CASES
IN THE
SUPREME COURT
OF
ALABAMA.

CRAWFORD v. BRANCH BANK AT MOBILE.

[6 ALABAMA, 12.]

DRAWER OF A BILL OF EXCHANGE UNDERTAKES TO PAY THE BILL at the place where it is drawn, upon default of the drawee, and not at the place where it is payable.

HOLDER OF A DISHONORED FOREIGN BILL OF EXCHANGE, DRAWN IN ALABAMA, MAY RECOVER from the drawer the damage and interest provided by the laws of that state.

ASSUMPSIT by the Branch Bank, on a bill of exchange for six hundred dollars, drawn by Crawford on C. L. Fonlen, of Washington city. Plaintiff recovered the amount, with interest and damages. Defendant appealed.

B. F. Porter, for the defendant in error.

By Court, ORMOND, J. The statute (Aik. Dig. 284, sec. 145) continues all causes which remain on the docket undisposed of until the succeeding term, without any action of the court in each particular case. In addition, it may be added, that the act of February, 1839, which prohibits a judgment from being rendered but by the consent of the parties at the appearance term, is in law a continuance of the cause until the ensuing or trial term.

By the act of drawing a bill, it is true that the drawer directs the payment of the money to the payee, or holder, at the place where the bill is payable; but the drawing of the bill creates also a conditional liability upon the drawer, that if the bill is not paid by the drawer, upon receiving notice of that fact, he will pay it. His undertaking is not to pay the bill at the place where it is payable, but at the place where it is drawn, upon default of the drawee, and by the law of the latter place must his

liability on the bill be ascertained. At least such are the legal inferences and consequences flowing from the mere fact of drawing a foreign bill; whether it is not competent for the parties, by contract, to create a law for themselves, by which the drawer on the dishonor of the bill should be liable as to damages and interest, according to the law of the place upon which the bill was drawn, need not be decided here. By the law of this state (Aik. Dig. 328, secs. 3, 4, 5, and 7) the liability of the different parties to a bill of exchange is ascertained and defined; by that law, it is expressly declared, that the damages upon a protested bill, drawn on persons without the limits of this territory, shall be ten per cent. besides legal interest, from and after the date of the protest, which, by the express provisions of the act, applies both to the drawer and indorsers.

By the use of the term "legal interest," we think it indisputable that the legislature meant the rate of interest established by law in this state; it is therefore unnecessary to consider what is the rule of the law merchant in such cases, though we do not doubt that an examination of the mercantile law would establish conclusively that our statute is merely in affirmation of it: See Story on Bills, 172, and authorities cited in note 2. The case of *Hanrick v. Andrews*, 9 Port. 9, determines no principle adverse to the view here taken, nor was the question here discussed, presented on the record. Some general remarks it is true may be found in the reasoning of the court, which considered apart from the point under discussion, lend some countenance to the view taken by the plaintiff in error. If, however, it were clearly and explicitly stated as the plaintiff in error supposes, not being a point raised upon the record, it is no authority in this court.

Upon the application of the plaintiff in error, a re-argument of the cause was directed, which being had, the following opinion was delivered:

By Court, GOLDTHWAITE, J. A rehearing was granted in this case at the last term, on motion of the plaintiff in error, and we have since then given much consideration to the written argument then submitted; but, notwithstanding, the court continues to hold the opinion that the judgment of the circuit court must be affirmed.

The contract of a drawer of a bill of exchange, is not a contract to pay the sum of money named in it, at the place upon which it is drawn; it is only a contract that the bill shall be accepted, and then paid by the drawee; and further, for the pay-

ment of the sum of money, and such other sum as will indemnify the holder, at the place where the bill is drawn, if it is not accepted or not paid, and is protested and notice duly given: Story on Bills, secs. 107, 114, 118. And this indemnity is governed by the law of the place where the bill is drawn, and not that of the place where it is made payable: *Id.*, sec. 176, and note 2, sec. 177. This is sufficiently evident, when it is considered that a suit may be brought against the drawer immediately upon giving him due notice of the non-acceptance of the bill, and its protest for that cause, if it be a foreign one: *Milford v. Mayor*, Doug. 54. In such a suit, although no interest would run until the maturity of the bill, the judgment would carry interest according to the law of the place where obtained, entirely independent of the circumstance, whether the bill had or had not, run to maturity. So, likewise, it is evident, from a consideration of the rules which regulate exchange and re-exchange in those countries where damages *eo nomine* are not given in lieu of these matters. In *De Tustet v. Baring*, 11 East, 265, it is said that the holder has the right to redraw for the precise sum which will produce the amount of the bill when payable, with the necessary expenses upon it. And in *Mellish v. Simeon*, 2 H. Bl. 378, an instance is given where a bill for six hundred pounds or more, was increased to nine hundred pounds and upwards, by an accumulation of re-exchanges. In the latter case it was held that the drawer in London, was responsible there for all this accumulation. It is entirely evident, that if the holder of the bill is authorized by the general law merchant to redraw, that the money for the redraft is payable at sight, at the place from whence the dishonored bill was drawn; and consequently if not paid, the money is then due, and bears interest according to the law of that place. So well settled is this rule, that Mr. Chitty recommends to his readers that it may frequently be important to limit the amount of re-exchange and expenses, as well as interest, by the terms of the bill: Chit. on Bills, 666; Story on Bills, secs. 397-401, and notes.

Judgment affirmed.

DAMAGES ALLOWED, FOR PROTESTED BILL OF EXCHANGE, against the maker: See *Robert v. Commercial Bank*, 33 Am. Dec. 570. Damages allowed against the indorser: See *Cullum v. Casey*, *Id.* 304.

THE PRINCIPAL CASE IS CITED and approved in *Crawford v. Branch Bank at Decatur*, 6 Ala. 576, to the effect that when the drawer of a foreign bill of exchange, drawn in Alabama, is sued either upon the non-acceptance or non-payment of the drawee, he will be liable to pay interest according to the law of Alabama; for, as to him, that is the *lex loci contractus*.

CALDWELL v. KIRKPATRICK.

[6 ALABAMA, 60.]

GENERAL COVENANT OF WARRANTY OF TITLE IN ALABAMA is in effect only a covenant for quiet enjoyment.

TO CONSTITUTE A BREACH OF WARRANTY OF TITLE IT IS NOT NECESSARY that there be an actual expulsion; the covenant secures a legal entry as well as the enjoyment of the lands.

ACTION on covenant. The breach alleged was, that the plaintiff was ousted from possession in this, that defendant never did place plaintiff in possession of said premises, and plaintiff has failed to obtain such possession by legal process. Also that defendant, at the time of the delivery of the deed, was not seised of the premises. Defendant had judgment. Other facts sufficiently appear in the opinion.

Cook, for the plaintiff in error.

Boling, contra.

By Court, ORMOND, J. The question to be settled in this case is, what is the import of the general covenant of warranty, upon a sale of lands in this state. In England, anciently, the covenant of warranty authorized the tenant, if he lost the lands, to recover of the warrantor, lands of equal value. This rule was of feudal origin, and according to the opinion of Chief Justice Parsons, in *Gore v. Brasier*, 3 Mass. 544 [3 Am. Dec. 182], had been so far relaxed before the settlement of this country, as to permit the tenant ousted, by title paramount, to maintain a personal action of covenant broken, on a real covenant of warranty. Be this as it may, it is certain that in modern times, the general warranty of a deed has been considered a personal covenant, though in England, and in many of the states of the union, it has gone into disuse, and been superseded by the more definite and precise covenants of seisin, right to convey, for quiet enjoyment, against incumbrances, and for further assurance: Platt on Cov. 305.

In this state, the most usual covenant, where one is entered into upon the sale of lands, is a general covenant of warranty of title. In our opinion, the only effect of this covenant, in this state, is for quiet enjoyment, which is an assurance against the consequences of a defective title, or of any disturbance in the enjoyment of the land conveyed. This is conclusively shown by referring it to its origin at a remote period of the common law. Its effect then, as we have shown, was to entitle the tenant, when evicted, to recover lands of equal value from the

warrantor—the silent operation of time, has converted the remedy into a personal action for damages, not for a defect of title in the grantor, or because there was an outstanding paramount title, but because the grantee had been ousted from the possession by one having a paramount title, and this answers only to the modern covenant for quiet enjoyment.

This has been the decision in other states. Thus, in *Emerson v. Proprietors etc.*, 1 Mass. 464 [2 Am. Dec. 34], in an action upon such a covenant as this, the court held, there could be no recovery without proof of an eviction, and Sedgwick, J., said, “that it was in fact, and in essence, a covenant for quiet enjoyment.” The same doctrine was asserted in *Townsend v. Morris*, 6 Cow. 123. It is also so considered in Kentucky and Virginia, as is shown by the citations in 2 Lomax’s Dig. 273, and doubtless in all the states where this covenant is used, as it is impossible to suppose at this day, that it is not a personal covenant: 4 Kent’s Com., 4th ed., 472. The effect then of the general covenant of warranty being for quiet enjoyment, we proceed to inquire, what rights are acquired under it, and what obligations it imposes. To constitute a breach of this warranty it is not necessary there should be an actual expulsion—the covenant secures a legal entry, as well as the enjoyment of the lands: *Ludwell v. Newman*, 6 T. R. 458; Platt on Cov. 327; 2 Lomax’s Dig. 269; *Gardner v. Keteltas*, 3 Hill, 332.

In this case, it appears that the grantor had neither the title nor the possession of the premises, at the time of the warranty, but that the possession was in one Reed, who claimed title and right of possession to the same. The counsel for the plaintiff, it is true, erred in considering the warranty a covenant, that the grantor was seised in fee of the premises, but the court also erred in charging the jury that the covenant was not broken, because it did not appear that Reed held under color of title, by some written contract or agreement. Until the grantor proved he had title to the land conveyed, the possession of Reed was sufficient evidence of title in him, and the plaintiff could not be required to commit a trespass by ousting him. The possession of Reed was *prima facie* evidence of title in him, which could only be repelled by evidence on the part of the grantor of a title paramount to his.

Let the judgment be reversed, and the cause be remanded.

EVICTIOIN NECESSARY TO MAINTAIN ACTION FOR BREACH OF COVENANT OF WARRANTY OF TITLE: See *Ferries v. Harshea*, 17 Am. Dec. 782, and cases collected in the note; *Logan v. Moulder*, 33 Id. 338.

In *Banks et al. v. Whitehead*, 7 Ala. 83, it was held an averment that at the time of the sealing and delivery of the deed another had the lawful title, freehold, and possession of the land warranted, by reason of which the grantee is and always has been unable to recover the possession, shows a sufficient breach of the general warranty, and is equivalent to the assertion of a legal ouster. So the vendee may purchase in a paramount title and recover upon his covenant of warranty, without being actually evicted; but he assumes the burden of proving that the title was paramount to that of the warrantor: *Davenport v. Bartlett et al.*, 9 Id. 179; *Dupuy v. Roebuck*, 7 Id. 484.

EX PARTE HARKINS.

[6 ALABAMA, 63.]

TESTIMONY OF WITNESSES RESIDING ABROAD.—The law of nations requires that the courts of different countries assist each other in obtaining evidence in furtherance of justice; and when the evidence of a foreign witness is required, the court wherein the action is pending may send to a court where the witness resides, a writ or letter rogatory asking the latter court to cause the deposition of the witness to be taken in due course of law. This practice of issuing letters rogatory and obtaining the evidence of foreign witnesses does not seem to have been exercised by the common law courts. They for a long time resorted to various devices, however, to compel assent to the examination of foreign witnesses.

DEPOSITION IN A CRIMINAL CASE could not, at the common law, be taken and read in evidence, unless by consent. Such deposition can not be taken in this state, there being no statute to authorize it.

MANDAMUS. Harkins having been indicted for assault and battery, with intent to murder, moved for a commission to take the testimony of a foreign witness. The motion was denied. He then applied for mandamus to compel the issuing of the commission.

Peck, for the petitioner.

Rice, contra.

By Court, COLLIER, C. J. Mr. Greenleaf, in his admirable treatise on evidence (pp. 367, 368) says, that the method of obtaining the testimony of witnesses resident abroad, has always been familiar in the courts of admiralty; and he supposes it to be within the inherent powers of all courts. The law of nations, says he, requires the courts of justice of different countries to assist each other for the furtherance of justice; and, hence, when the testimony of a foreign witness is necessary, the court before which the action is pending may send to a court within whose jurisdiction the witness resides, a writ, called a letter rogatory, requesting the court abroad to cause the deposition of the foreign wit-

ness to be taken in due course of law. The court of chancery has always freely exercised this power; but the learned author says, the courts of common law seem not to have asserted it in a direct manner and of their own authority. They have, however, used means to coerce the adverse party to consent to the examination of witnesses who were absent from the state. These coercive means were such as putting off the trial, or refusing to enter judgment, as in case of nonsuit, if the defendant was perverse; or by a stay of proceedings, till the party applying for the commission could have recourse to a court of equity, by instituting a new suit there auxiliary to the action at law. Subsequently, however, the courts refused to do that by indirection which they could not do directly, and by legislative enactment; but in Great Britain, and the most of the states of the union, the inconvenience has been remedied: Greenl. Ev. 369-374.

Mr. Blackstone, 3 Com. 383, in treating of the trial by jury, and its defects, in connection with the limited powers of courts of law, says that these courts have not the power to examine witnesses abroad, or such as may be going abroad, and receive their depositions in writing, *de bene esse*. This, says he, may be done at any time through the channel of a court of equity. Such was the law in respect to depositions taken in civil cases pending in common law courts, independently of statutory regulations. In *The People v. Restell*, 3 Hill (N. Y.), 289, the question was most elaborately and learnedly considered, whether, according to the principles of the common law, a deposition could be taken and read as evidence in a criminal case, without reference to the consent of parties. The conclusion was, that the common law did not authorize evidence to be thus taken in such a case. The court say, that the authority for using depositions as evidence in crown causes, is the statute of 1 and 2 Phil. and Mary, c. 13, which requires the magistrates, before whom a prisoner is brought, to take his examination, and the information of them that bring him, put the same in writing, and certify it to the next jail delivery within his commission. This statute applies only to felonies; and it is settled that depositions taken in the manner it prescribes, are not admissible in cases of misdemeanor: *Rex v. Paine*, 1 Salk. 281; S. C., 1 Ld. Raym. 729; S. C., 5 Mod. 163; S. C., Comb. 358; S. C., Carth. 405.

The learned counsel, who moved for a *mandamus*, has cited *The People v. Restell* to show, that, although witnesses can not be examined *de bene esse*, at the instance of the state, yet they may be, after indictment found, at the instance of the defend-

ant. It is certainly stated in the opinion of the court, that such is the law in New York; but the court cite several legislative provisions of that state to which the common law is indebted for a modification in this respect. In that case (*Matthews v. Port*, Comb. 63, and Vin. Abr., Evidence, A. b. 32, pl. 7), are commented on, and the conclusion attained, that the case in *Comberbach*, which is noticed by Mr. Viner, is an incorrect report of what was, at most, a mere *dictum*; and does not lay down the law with accuracy. See also 3 Dane's Abr., c. 87, arts. 2 and 3; 2 Stark. Ev. 485.

No statute has been enacted in this state, which authorizes a deposition to be taken in a criminal case; and the fact that the attention of the legislature must have been called to the subject, when it provided this method of taking testimony in a civil suit, should disincline us to grant the motion, even if we thought the matter was within our discretion. Without attempting to controvert what Mr. Greenleaf says about the inherent powers of courts, as founded upon the law of nations, it is quite enough to say, that neither the courts of England or the United States, which proceed according to the course of the common law, have at any time, in virtue of such power, claimed the right to cause testimony to be taken by deposition. And we are unwilling to be the first to make a precedent. If the greater inconvenience or injustice is likely to result from the law as it now stands, which we very much question, the legislature can provide the appropriate remedy.

The view taken has led us to the conclusion, that the circuit court had not the authority to make the order which the defendant sought; and this court can not, consequently, award the *mandamus*, but must deny the motion for that purpose.

DEPOSITION OF A DECEASED PERSON, taken in the absence of the defendant in a criminal action, is inadmissible: *State v. Hill*, 27 Am. Dec. 406. Deposition of a witness in relation to a crime, in which he and others are implicated, can not be used against him in Arkansas: *Dunn v. State*, 35 Id. 54.

PREWITT v. GARRETT.

[6 ALABAMA, 128.]

PLAINTIFF MAY INDEMNIFY A SHERIFF FOR LEVYING and selling property supposed to belong to the defendant, but in the possession of, and claimed by another.

BOND OF INDEMNITY IS ILLEGAL AND VOID AND CAN NOT BE ENFORCED, that is to save a sheriff harmless for levying upon and selling the property of a stranger to the judgment, and not supposed to belong to the defendant in execution.

ACTION on an indemnity bond. A judgment was recovered against Allen and Rogers. They directed the sheriff to levy upon a female slave belonging to the estate of one Wyatt, deceased, to satisfy the judgment against them, and gave the indemnity, with Garrett as surety, upon which this suit is brought by the sheriff to save him harmless. Judgment for the defendant. Plaintiff brings this writ of error.

Bolling, for the plaintiff in error.

By Court, ORMOND, J. The bond in this case was given by the defendants in execution, to indemnify the sheriff against the consequences of levying on and selling the property of a stranger to the judgment and execution, for its satisfaction. This was a promise to indemnify the sheriff against the consequences of a trespass, which he was invited to commit; and, being illegal, no right of action can grow out of it. The plaintiff in an execution may indemnify the sheriff for levying on and selling property supposed to belong to the defendant, though out of his possession, and claimed by another; but it is impossible to conceive of a case in which the property of a stranger to the judgment could be sold, at the instance of the defendant in execution, to satisfy the judgment. The indemnity being to save the sheriff harmless against the consequences of an act prohibited by law, can not be enforced in a court of justice.

The judgment of the court on the demurrer must be, therefore, affirmed.

PROMISE TO INDEMNIFY, WHEN VOID: See *Coventry v. Barton*, 8 Am. Dec. 376, and note, 378; also *Davis v. Arledge*, 30 Id. 360, and the note to *Ives v. Jones*, 40 Am. Dec. 425-427.

BANK OF MOBILE v. HALL.

[6 ALABAMA, 141.]

DECREE IS FINAL WHEN IT ASCERTAINS ALL THE RIGHTS OF THE PARTIES in litigation, although there may be a reference to the master to ascertain facts for an account between the parties. These are ministerial acts, and do not affect the decree.

NEW PARTIES MAY BE BROUGHT IN AFTER A FINAL DECREE, and a reference to the master to take an account, if they affect only the account and not the merits of the action.

DECREE MAY BE FINAL SO AS TO SUSTAIN A WRIT OF ERROR; yet while the cause remains on the docket for any purpose, the statute barring writs of error does not begin to run.

ERROR. Motion to dismiss the writ of error, on the ground that the decree is interlocutory merely, and not final.

Phillips, for the plaintiff in error.

Campbell, *contra*.

By Court, ORMOND, J. The bill was filed by the defendant in error against the plaintiff in error, and others. The bill, in substance, alleges the purchase, by the complainant, of one S. Andrews, of several lots in the city of Mobile, at the price of twenty thousand dollars, payable in four installments, for which notes were executed. That the first note was paid; about which time Andrews became insolvent, and absconded. That, at the time of the purchase, there was an incumbrance on the land for the sum of ten thousand two hundred dollars, secured by a deed of trust, which, although recorded, he was ignorant of. That the land was advertised to be sold under the deed of trust, and purchased in by complainant at eight thousand six hundred dollars, the amount due. That the Bank of Mobile became the proprietor of the second, and William R. Hallett of the third note, with notice of the complainant's equity. The prayer of the bill is, that Hallett and the bank be enjoined from suing upon, or negotiating the notes, and for general relief. The bill was answered by the bank and Hallett, and came on for hearing before the chancellor, on the bill, answers, and documentary evidence, when his honor made a decree in writing; in which, after an elaborate examination of the facts and law of the case, he determined that the complainant had the paramount equity, and refers the cause to the master to state an account between the parties.

We are unable to distinguish this case from the case of *Weatherford v. James*, 2 Ala. 170. It is there said that a decree "is final when it ascertains all the rights of the parties in litigation," although there may be a reference to the master to ascertain facts for an account between the parties. That those acts are ministerial in their character, and do not affect the decree. Such is the fact in this case. The chancellor affirms that the complainant is entitled to the equity he seeks by his bill, and the entire object of the reference to the master was, to ascertain facts to enable the chancellor to apportion the loss among the defendants. It is true, the decree is not very for-

mal, but in a court of chancery, substance is regarded, and not form. The intention of the chancellor can not be mistaken. The fact that costs were not awarded, is not material: such is not usually the case, until the last decree made in the cause.

The principal difficulty we have felt, arises from the proceedings had subsequent to the decree of the chancellor. Some time subsequent to the decree, the complainant filed his petition, alleging that one Campfield held the remaining note, and had sued him thereon in the United States court; and praying leave to file a supplemental bill to make Campfield and another a party; which was granted. This supplemental bill was answered by Campfield and others; and other proceedings were had which need not be mentioned. Although these proceedings, subsequent to the decree, and while it continued in force, were irregular, they can not invalidate it, or render it inoperative. The object, indeed, of these proceedings was, to carry out the principles of the decree, by bringing before the court all those interested in the notes which were affected by the equity of the complainant.

It is important that litigation should end, at least in a court of chancery, as soon as the merits of a case are ascertained, and a point reached which decides the principle which must govern it. Thus, in this case, if the opinion of the chancellor is erroneous, the delay, expense, and trouble attending the ascertainment of the facts preparatory to an account, are unnecessary and profitless. The case of *Kennedy's Heirs v. Kennedy*, 2 Ala. 571, is, in principle, like this. There, as here, the chancellor merely decreed, that the complainant was entitled to the equity sought by his bill, referring the complicated matter of account to the master. Yet this court did not hesitate to take jurisdiction of the case; nor was the jurisdiction questioned by the able counsel concerned in it. A decree of the court of chancery may be final in this sense, so as to sustain a writ of error, but whilst the cause remains on the docket for any purpose, the statute barring the prosecution of writs of error, after three years from the rendition of judgment, does not begin to run. The final judgment there spoken of, is evidently the last judgment rendered, and which disposes of the entire case.

Motion denied.

DECREES ARE NONE THE LESS FINAL because further proceedings before the master are requisite to carry it into effect: See *Mills v. Hoag*, 31 Am. Dec. 271, and note 274.

KING v. MOORE.

[6 ALABAMA, 100.]

MONEY MAY BE ATTACHED IN THE HANDS OF AN OFFICER, where it is the residue of the proceeds of goods sold under execution, and remaining due defendant after fully satisfying the writ.

WRIT of error. King was garnished in the suit of Moore against Lewis, he having one hundred and thirteen dollars belonging to Lewis, the remainder of the proceeds of a sale made by him as constable after satisfying his *fiery facias*. Judgment was rendered against him for the amount of the judgment rendered against Lewis, from which he brings this writ of error.

Heydenfeldt, for the plaintiff in error.

No counsel appeared for the defendant in error.

By Court, **GOLDTHWAITE, J.** In *Zurcher v. Magee*, 2 Ala. 253, we held, that money collected by a sheriff was not subject to an attachment against the plaintiff in the execution; but the principle of that case is supposed not to govern this. One reason why money, in this condition, can not be reached, is, that it is in the custody of the law; and it would be greatly inconvenient to allow the final process of courts to be affected by other proceedings not under control of the parties to the execution. This reason does not apply to the excess which oftentimes must, necessarily, remain with the executive officer, after satisfying the plaintiff's demands. The officer is the agent appointed by the law, to sell the property of the defendant; and if, in the discharge of this duty, a sum of money remains with him, it is the money of the defendant, in no way distinguishable from any other case of agency. Nor does the circumstance, that a statute authorizes the defendant, when his money is improperly detained from him, to proceed summarily against the officer, bring the case within the principle which exempts money, *in custodia legis*, from attachment, because no process is meddled with; nor can any injurious consequences flow from considering it in the same view as any other money in the hands of an agent.

Let the judgment be affirmed.

ATTACHING MONEY IN HANDS OF AN OFFICER.—Money collected by a justice of the peace in his official capacity, may be attached: *Clark v. Boggs, post*. A surplus remaining in the hands of the register of a court of chancery, after satisfying a decree, may be attached, and this although the sale has not been confirmed: *Langdon v. Lockett, post*. But it has been repeatedly adjudged.

that money collected by a sheriff in virtue of an execution, can not be attached as the property of the judgment creditor: *Zurcher v. Magee*, 2 Ala. 255; *Ross v. Clark*, 1 Dall. 354; *Alston v. Clark*, 2 Hayw. 171; *Dawson v. Holcomb*, 13 Am. Dec. 618.

GARDNER & SAGER v. ALLEN'S EX'R.

[6 ALABAMA, 187.]

PURCHASER FROM AN AGENT MAY OFFSET A DEBT DUE HIM by the latter in a suit by the principal for the purchase money, where he has no knowledge of the agency at the time of the purchase.

ERROR. Labuzan & Pollard received from Allen cotton, which they placed in the hands of Gardner & Sager, to be sold in Liverpool, and received an advance thereon. The cotton sold for just enough over the advance to pay Gardner & Sager what Labuzan & Pollard were owing them. Plaintiff below recovered judgment for that amount. Defendants prosecuted this writ of error, on the refusal of the court to allow them to introduce evidence to show that they received the cotton believing it to belong to Labuzan & Pollard, and were ignorant of the plaintiff's right to it.

Gibbons, for the plaintiffs in error.

Lesene, for the defendant in error.

By Court, COLLIER, C. J. It has been often stated, as an acknowledged principle, if a factor sells goods in his own name, the purchaser, without a knowledge of any other person being a party to the contract, in the absence of collusion, is entitled to regard the debt as due to the factor, so as in an action brought by the principal, to set off a debt due from the factor to himself: Paley on Agency, 326-335. Mr. Justice Story, in his treatise on the law of agency, says, if the agent is the only known or supposed principal, the person dealing with him will be entitled to the same rights of set-off as if the agent were the true and only principal: P. 432. And in such case, the set-off is equally good, whether a suit be brought in the name of the principal, or of the factor or agent, for the price of the goods: Id. 452. See, also, Id. 417-419, and cases there cited. In *Mitchell v. Bristol and Powell*, 10 Wend. 492, the law is laid down in equivalent terms, and the court, after citing several English decisions, say, in these cases it is held, that it makes no difference whether the sale by the agent is under a *del credere* commission or not; the reason of the law is the same in both cases. But it is needless

to elaborate the point at greater length. The authorities cited very fully show that it is quite immaterial whether the principal or his agent is the plaintiff. If the latter sue, the defendant may avail himself of any set-off, which he has against the former; or, if the former be the actor in the suit, the purchaser may set off a claim which he has against the latter, if he purchased under a just belief authorized by the facts of the case, that the agent was the real owner of the goods: *Story on Agency*, 417, 418. And this seems to be the current of decision, both in England and the United States, without regard to the extended or restricted terms of the statutes of set-off: *Caines v. Brisban*, 13 Johns. 9. This being the law, it is clear, that the court should have permitted the defendants to show that they shipped the cotton on account of Messrs. Labuzan & Pollard, under such circumstances as might well induce them to believe that it was their property. The sufficiency of this evidence was a question of fact to be considered by the jury, under the direction of the court; but being admissible, its rejection is an error, for which the judgment is reversed, and the cause remanded.

SET-OFF, BY PURCHASER FROM AGENT, IN ACTION BY PRINCIPAL.—Where a person sells goods to a purchaser, without disclosing his agency, and the purchaser has no knowledge that the former is not the owner of the goods, the purchaser may, in an action by the principal for the purchase money, set off a demand due him from such agent: *Hogan v. Shorb*, 24 Wend. 458; *Bliss v. Bliss*, 7 Bosw. 339; *Administrator of Conyers v. Magrath*, 4 McCord, 392; *Stacey v. Deey*, 7 T. R. 361, n. In *Radbone jun. v. Williams*, Id. 360, n., Lord Mansfield said: "Where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has the right to consider him, to all intents and purposes, as the principal. And though the real principal may appear, and bring an action upon that contract against the purchaser of the goods, yet the purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled." And in *Hogan v. Shorb*, 24 Wend. 458, the purchaser was allowed to set off a demand against the factor, although it consisted of a note not due until forty-five days after the sale, which was to be a cash sale, and the purchaser did not intend at the time to abide by the contract, but purposed to set off his demand against the factor. The action was brought after the maturity of the note, and Bronson, J., said: "If Morris [the factor] had brought the action, the set-off could not have been resisted. How stands the case with the plaintiff? When the sale is made by a factor, an action for the price may always be brought by the principal, as well as by the agent; and the rule is the same although the agent acts under a *del credere* commission. But the principal, by suing in his own name, can not defeat the existing equities between the vendee and the factor, unless they are chargeable with collusion, or there has been some act on the part of the vendee which operates as a fraud upon the owner of the property. The same principle applies where one of several partners is permitted to act, and hold himself out to the world as though he were the

only person interested in the business. He can not, by uniting the names of the sleeping partners in a suit against a third person, defeat a set-off which would have been available had he sued alone. In *Baring v. Corrie*, 2 Barn. & Ald. 137, the sale was made by a broker; and in an action by the principal, the vendees were not allowed their debt against the broker. But the case turned principally on the distinction between a *factor*, who is usually intrusted with the goods, and sells in his own name, and a *broker*, who is not usually intrusted with the goods, and ought only to sell in the name of his principal; and stress was laid on the fact, that the plaintiffs had not enabled the broker to impose on third persons, by intrusting him either with the possession of the goods, or the muniments of their titles. When the name of the principal is disclosed at the time of the sale, the vendee has no right to set up any equities between himself and the factor to defeat the action of the owner; and the same consequence will, I think, follow, if the vendee knew or had good reason to believe he was dealing with the agent of another, although the name of the principal was not disclosed. But a mere general knowledge that the person selling the goods is a factor, if he also carry on business on his own account, will not be sufficient to charge the vendee with notice. He must know, or have good reason to believe, that the vendor is acting as the agent of some other person in that particular transaction." In *George v. Clagett*, 7 T. R. 359, the plaintiff employed certain persons as his factors under a *del credere*, who also bought and sold on their own account. The defendants were the holders of a bill of exchange accepted by the factors, received in the course of business, and bought goods from the factors at twelve months' credit. Part of the goods belonged to the plaintiff, but this fact was unknown to the defendants until after the failure of the factors, when they were notified of that fact by the plaintiff. It was held that the defendants were entitled to set off their demand on the bill of exchange against the factors, on the ground that the defendants dealt with them as principals. This case of *George v. Clagett* has ever been considered as a leading one upon this subject. It has been followed in *Coats v. Lewis*, 1 Camp. 444; *Carr v. Hinchliff*, 4 Barn. & Cress. 551; *Taylor v. Kymer*, 3 Barn. & Adol. 334; *Bastable v. Poole*, 5 Tyrw. 111; *Purchell v. Salter*, 9 Dow. 520; S. C., 1 Q. B. 197; *Sims v. Bond*, 5 Barn. & Adol. 393. See 2 Smith's Lead. Cas., note to *George v. Clagett*, 198; Paley on Agency, secs. 334, 335; Waterman on Set-off, sec. 268.

ROBINSON v. GARTH.

[6 ALABAMA, 204.]

SALES OF LANDS BY SHERIFF UNDER EXECUTIONS are within the statute of frauds.

MEMORANDUM OF SHERIFF, LIKE THAT OF AN AUCTIONEER, made at the time of the sale, binds the purchaser, he being the agent of both parties.

SHERIFF MAY RESELL, WHERE PURCHASER AT AN EXECUTION SALE REFUSES to comply with his contract.

SHERIFF MAY SUE FOR BREACH OF CONTRACT where purchaser at execution sale refuses to comply with his contract; so also may the plaintiff in execution.

SHERIFF CAN NOT INTRODUCE HIS OWN MEMORANDUM OF SALE, to take it out of the statute of frauds, when suing purchaser at an execution sale

for breach of his contract. The sheriff is incompetent by reason of being a party to the record: *aliter* if the suit is brought by the plaintiff in execution.

ROBINSON, as sheriff, sued the defendant for the difference between the sum bid by him at an execution sale of land, and the price at which it was resold, upon his refusal to comply with the purchase. The court charged that the sheriff's memorandum of the sale was insufficient to take the case out of the statute of frauds, and that the action was barred by the statute in the absence of a memorandum. Judgment for defendant.

McClung, Parsons, and Hopkins, for the plaintiff in error.

Cooper, contra.

By Court, OSMOND, J. The question, whether sales of land, by the sheriff under execution, are within the statute of frauds, is one of great moment, and of some difficulty. The publicity of these sales may remove some of the dangers from perjury to which private sales of land might be subject; but this is an argument which would apply with almost equal force to ordinary sales of land by auction, which are confessedly within the statute. There would be some more plausibility in the argument, if the sale by the sheriff, *ipso facto*, divested the title to the land out of the defendant in execution, and vested it in the purchaser; but such is not the fact. The purchaser, at sheriff's sale, acquires no title to the land until he pays for it, and obtains the sheriff's deed, which the statute, authorizing the sale of land under execution, directs the sheriff to make, and which, when made, conveys to the purchaser the legal title of the defendant in execution to the land: *Clay's Dig.* 205, sec. 17, p. 216, sec. 76. This is very conclusive to show, that the legislature did not intend to withdraw sheriffs' sales of land from the operation of the statute of frauds, but that such sales were to be evidenced in the same manner as other sales of land are required to be by that statute. Such has been the decision in other states on a similar statute, as shown by the citations of the defendant in error.

In *Adams v. McMillan*, 7 Port. 78, it was held, after a review of the authorities, that an auctioneer, upon the sale of land, was the agent of the purchaser; and that his writing the name of the purchaser on the memorandum of sale immediately on receiving the bid and knocking down the hammer, is a sufficient signing of the contract within the statute of frauds. The sheriff is certainly as much the agent of the parties in a sale of

land under execution, as an auctioneer in an ordinary sale by auction. All the reasoning which applies to the latter, acquires increased force when considered in reference to the former, as the sheriff is not only the agent of the parties, but the accredited officer of the law, acting under the sanction of an oath. Such being the case, we are very clear that the memorandum of the sale offered in evidence, if in fact made by him at the time of the sale, was such a memorandum or note, in writing, of the contract, as would satisfy the statute of frauds. It contains all the necessary constituents of the contract—an accurate description of the land sold, the price to be paid for it, and the name of the purchaser; and would have enabled the purchaser, if, on tendering the money, the sheriff had refused to execute a deed for the land, to enforce a specific performance in equity. This renders it unnecessary that we should consider the effect of the deed, subsequently tendered by the sheriff as a memorandum, or note in writing, under the statute.

In the case of *Adams v. McMillan*, 7 Port. 88, already referred to, it was held, that, upon the refusal of a purchaser of lands, sold at public auction, to comply with his contract, the vendor had, as an incident of the contract of sale, the right to resell the lands by auction—that when the power of resale was one of the conditions of the first sale, the difference between the two sales would be the measure of damages. If no such power was reserved at the first sale, then the difference between the two would not be binding on the jury as the measure of damages, but would be fit and proper testimony to be received by them as a means of attaining a correct conclusion, that both sales should be fairly conducted, etc. As already observed, we are unable to perceive any difference in this respect between sheriffs' sales and other public sales of land at vendue. The decision, therefore, above quoted, applies to this case, and is, in our opinion, in point, as to the right of resale. See, also, *School Commissioners v. Aikin*, 5 Port. 169.

Has the sheriff the right to maintain an action for the breach of this contract? Upon this point of the case, we have felt much difficulty. An auctioneer has such an interest in the article intrusted to him for sale, as will enable him to maintain an action for the purchase money against the purchaser, although the owner of the goods be known. This principle was first asserted in the case of *Williams v. Millington*, 1 H. Bl. 81. The chief justice, in the course of his opinion, says: "It is not a true position that two persons can not bring separate actions for the

same cause. The carrier and the owner of goods may each bring actions on a tort; the factor and owner may each have actions on a contract." And by the whole court the action was held to be maintainable. See, also, *Coppin v. Walker*, 7 Taunt. 237; and *Coppin v. Craig*, Id. 243.

The sheriff, like the auctioneer, has not only an interest in the thing sold and the proceeds to pay his commissions and fees of office, but he has an interest and right to the proceeds of the sale, as the appointed organ of the law for that purpose, to enable him to obey its mandate and bring the proceeds into court. We do not doubt that those for whom the sheriff acts, and who are interested in the money to be recovered, may also maintain the action; but, in practice, great, if not insurmountable difficulties would be encountered if the action were brought in the name of the plaintiff in execution. It would frequently happen that many persons, as plaintiffs in execution, would be interested in the same funds; and, if not sufficient to satisfy all, the most embarrassing questions would arise in settling priorities of rights, as it would be necessary that each should sue separately. All these difficulties are avoided by considering the sheriff, as in fact he is, a trustee for the benefit of all interested in the fund. The money, when received by him, would be received in virtue of his official character, and for which he would be responsible as for money received by virtue of a sale under execution.

There is still remaining a question of considerable difficulty. It is whether the memorandum of the contract of sale, made by the sheriff, can be offered in evidence when the action is brought in his name. In *Wright v. Dannah*, 2 Camp. 203, the memorandum of the sale, relied on to take the case out of the statute of frauds, was made by the plaintiff, the defendant overlooking him and approving it. Lord Ellenborough held, that the agent must be some third person, and could not be the other contracting party. In *Farebrother v. Simmons*, 5 Barn. & Ald. 333, the precise question we are now considering was presented, the memorandum being made by the auctioneer, and the suit being in his name. The court held that, although the auctioneer may be considered as the agent and witness of the parties, yet when he sues as one of the contracting parties, he can not maintain the action by his own testimony.

Some doubt is thrown over these cases by the remarks of the judges in the case of *Bird v. Boulter*, 4 Barn. & Adol. 443; but the question was not presented in that case. The action was by the auctioneer, but the memorandum of the sale was made, not by

the auctioneer, but by his clerk, who was, by the court, considered as the agent of the purchaser for that purpose. The difficulty which seemed to press upon the court in regard to the cases of *Wright v. Dannah* and *Farebrother v. Simmons*, was, that the liability of the purchaser should not depend upon the fact, whether the action was brought by the auctioneer or the owner of the goods; and that is certainly true. But the point under consideration in those cases, as in this, was not whether the defendant was liable, but whether it was competent to establish that liability by the testimony of a party to the record. That is a question about which it is apprehended but little difficulty can be entertained. The sheriff, as plaintiff on the record, was liable for the costs of the suit, and had also a direct interest in the event of the suit, being entitled to a portion of the money sought to be recovered, and, upon well established principles, was incompetent either to testify orally to the jury in support of the interest he represented, or to give evidence of an admission or declaration made by him previous to the suit being brought, having the same object in view.

These principles are so universally recognized, that no doubt whatever could have arisen as to their correctness, but from the fact that the memorandum made by the sheriff would have been competent evidence of the fact of the purchase of the lands by the defendant, if the suit had been in the name of the plaintiff in execution, or of some one having an interest in the proceeds of the sale. Evidence, to be competent, must be so, not only as it regards the subject-matter of the suit, but also in reference to the parties on the record. In *Blann v. Beal*, 5 Ala. 357, a father brought a suit against the clerk of the county court for issuing a license to marry his daughter, under the age of eighteen years, without his consent. To prove the age of the young lady, he relied on a memorandum made by himself in the family register of births many years before. The court held, that although this memorandum would have been evidence of the facts recited in it, in a suit in which he was not a party, as a declaration *ante litem motam*, by one who knew the fact and had no motive to misrepresent it, that it was not evidence for him in a suit in which he was a party on the record. The principle of that case is the one involved in this, and is conclusive to show that the evidence was inadmissible in this suit.

It results from this examination of the cause, that the charge of the court was, in substance, correct, as the memorandum made by the sheriff was not evidence in this cause to take the

case out of the statute of frauds; and the judgment is, therefore, affirmed.

SHERIFF MAY RESELL if purchaser at execution sale does not pay his bid: *Darnford v. Degruys*, 13 Am. Dec. 235. So also may constable: *Coffman v. Hampton*, 37 Id. 511. The principal case is cited and approved in *Lambin v. Crawford*, 8 Ala. 153, where it was held that on a resale by a sheriff, the measure of damages is the difference between the first bid and the subsequent sale; and that a count upon an implied contract to pay the same is good. It is also cited in *Bell v. Owen*, 8 Ala. 312, to the effect that an action for refusing to comply with a contract of sale, made with a sheriff upon a sale of property under execution, is properly brought in the name of the sheriff.

SHERIFF'S SALE OF REAL ESTATE is not within the statute of frauds: *Nichol v. Ridley*, 26 Am. Dec. 254, and cases collected in note. Sufficient sheriff's memorandum within the statute: *Hanson v. Barnes' Lessee*, 22 Id. 322.

BARTLETT ET AL. v. DOE EX DEM. GAYLE ET AL.

[6 ALABAMA, 305.]

JUDGMENT LIEN IS DESTROYED BY AN INJUNCTION ISSUED UPON THE EXECUTION OF A BOND with sureties by the defendant in the judgment. *Aliter* if it is a replevy bond, forthcoming bond, or a bond to try the right of property.

WHERE EXECUTION SALE IS ENJOINED AT THE SUIT OF A STRANGER to the judgment, the injunction bond given by him does not destroy the judgment lien. It operates as a security for damages that may accrue by delaying the sale.

ERROR. Bartlett and Waring recovered a judgment against McRae, as surviving partner of the firm of McRae & Lang. An execution was issued thereon and levied on the land in controversy, August 1, 1838. Mrs. Lang, administratrix of the deceased partner, executed a bond with sureties, and obtained an injunction on the ninth of the same month, restraining the sale, which was not dissolved till January 7, 1839. On March 4, 1839, the land was sold by the sheriff, and purchased in by Bartlett and Waring. The land was partnership property of McRae & Lang, and McRae, after the death of Lang, executed a deed of trust, December 6, 1838, with a power of sale to secure the payment of a partnership note. A sale took place under this deed, at which Gayle & Phillips' lessors became the purchasers May 4, 1840. This action of ejectment was brought against Bartlett & Waring to obtain possession. The court gave judgment for the plaintiffs.

Stewart and Campbell, for the plaintiffs in error.

Phillips, for the defendants in error.

By Court, COLLIER, C. J. The only question necessary to be considered in this case is, whether the order for an injunction made upon the bill of Mrs. Lang, and the execution of a bond by her with sureties, suspended the lien of the judgment in favor of the plaintiffs below against McRae, as the surviving partner of Lang, until the injunction was dissolved? It has been repeatedly held, as well by ourselves as our predecessors, that the effect of an injunction regularly issued upon the execution of a bond with surety, by the defendant in the judgment, is to destroy the lien of the execution enjoined: *Mansony and Hurtell v. The U. S. Bank and its Assignees*, 4 Ala. 750, and cases there cited. So, where an execution is superseded, by giving bond with surety upon suing out a writ of error, the lien of the judgment is discharged: *Campbell etc. v. Spence et al.*, Id. 543 [39 Am. Dec. 801]. But the lien is not impaired by the execution of a replevy bond, forthcoming bond, or a bond to try the right of property: Id.; *Mills v. Williams et al.*, 2 Stew. & P. 390; *McRae and Augustin v. McLean*, 3 Port. 138.

It is insisted for the plaintiff in error, that a judgment only operates a lien upon the lands of the party against whom it is recovered so long as it may be enforced by execution; and that the injunction restraining all proceedings as to the premises in question, relieved them from the lien of the judgment: See *Mansony and Hurtell v. The U. S. Bank etc.*, *ut supra*; *Wood v. Gary*, 5 Ala. 48. The principle upon which an injunction has been held to discharge the lien of a judgment or execution, is, that the bond which the complainant executes furnishes the plaintiff with another security for his debt; and upon which he may, after the injunction is dissolved, have an execution: *Conway v. Jett*, 1 Mart. & Y. 373 [14 Am. Dec. 590]; *Smith et al. v. Everly*, 4 How. 178; Clay's Dig. 357, sec. 79. Now the condition of the bond in the case before us, is, that the complainant "shall pay and satisfy all damages which the said defendants may sustain by the wrongful suing out of the said injunction." It is perfectly clear that the undertaking of the obligors does not oblige them to pay and satisfy the judgment, if the bill for an injunction shall be unsuccessfully prosecuted; it merely binds them to make good any loss which the obligees sustained by reason of the groundless exhibition of the bill. Thus, if the property depreciated in value during the period that the injunction continued in force, by the burning of houses, etc., so that the plaintiff could not obtain satisfaction of his execution; in such case, the plaintiffs in the judgment may resort to their rem-

edy upon the bond. But if the property continues of value sufficient to satisfy the judgment, the plaintiffs have sustained no damage for which they can charge the sureties in the bond; as for the delay in its collection, the law regards the interest as an equivalent for that.

Upon this point, the case of *Hanley v. Wallace*, 8 B. Mon. 184, is a direct authority for the plaintiffs in error. The court there say, where a judgment is enjoined at the suit of a stranger to it, and an injunction bond given by him to restrain the sale of a particular article of property; whatever may be the condition of the bond, it operates in equity, only as a security to the obligee for the injury that may accrue, not for the amount of the debt. Here the law is laid down in stronger terms than the condition of the bond in the present case requires. It may also be remarked that no execution can be issued upon the bond; 1. Because it does not enjoin the judgment, but only proceedings thereon, as it respects the premises in controversy. 2. Because the defendant at law is not the complainant in equity.

From this view it results, that the lien of the judgment is paramount to that of the deed of trust: the consequence is, that the decision of the circuit court upon the facts is erroneous—its judgment is, therefore, reversed, and the cause remanded if the defendant in error desires it.

JOHNSON v. HANSON.

[6 ALABAMA, 351.]

ACTION AT LAW CAN NOT BE MAINTAINED FOR THE PURCHASE MONEY OF LAND, there being no note or memorandum of the sale, although the vendee received and retains possession.

THE plaintiff in error brought assumpsit against the defendant, alleging a sale of land for eight hundred dollars; that the defendant went into peaceable possession thereof, has retained it ever since, and paid three hundred dollars of the purchase money; that plaintiff is able and ready to make title upon the payment of the balance of the purchase money. Defendant demurred, which was sustained, and judgment given for him, plaintiff refusing to amend.

Bowdon, for the plaintiff in error.

Morris, *contra*.

By Court, ORMOND, J. It is not, in general, necessary to allege in a declaration, a written promise, where the necessity

for the promise, being in writing, is created by statute, as it is matter of evidence to be proved at the trial. But in this case, it is expressly alleged that the contract for the sale of the land, which was the consideration of the promise laid in the declaration, was merely verbal, and the precise question is, whether an action can be maintained at law, to recover the purchase money of land, there being no note or memorandum thereof in writing, because the vendee retains the possession. A court of chancery acting on its own peculiar rules, will, in certain cases, for the prevention of fraud, enforce a specific performance of a verbal contract for the sale of land; as where there has been a part performance of the contract, but we are not aware that such a power has ever been acknowledged to reside in a court of law. Doubtless some isolated cases may be found, in which it has been held that the equitable circumstances which would authorize a court of chancery to grant relief, might be considered in a court of law. Lord Redesdale remarks: "Mr. Justice Buller says, in one or two cases, that part performance will take a case out of the statute, as well at law as in equity. This opinion will be found wrong; and I recollect Mr. Justice Buller, on being pressed with the consequences of that opinion, in case of a demurrer to evidence, being obliged to abandon the position. The ground on which a court of equity goes in cases of part performance, is that sort of fraud which is cognizable in equity only." *O'Herlihy v. Hedges*, 1 Sch. & Lef. 130.

So this court, in the case of *Meredith v. Naish*, 3 Stew. 207, intimated an opinion, that in a case circumstanced like the present, the vendor could recover. But these cases appear not to have been well considered; at least it is clear, the decisive current of authority is the other way. In *White v. Beard*, 5 Port. 100 [30 Am. Dec. 552], although this question was not distinctly presented, this court intimated an opinion, that the equitable right of the vendor acquired by part performance, was not a legal consideration for a note given for the purchase money after such performance. To the same effect is *Howard v. Easton*, 7 Johns. 205, to which many other cases might be added.

The recent decision of *Cope v. Williams*, 4 Ala. 364, has been pressed on the court, as tending to a contrary conclusion. In that case, the vendee in possession, brought an action to recover back the purchase money. This court held, that it was contrary to equity and good conscience, to permit him to assert the invalidity of a contract, by virtue of which he retained the possession of the land; the vendor being willing to execute the

contract. The difference between that case and the present is, that here the vendee repudiates the contract, and if he retains the possession of the land, it is not by force of the contract, which at law can confer no rights on either party, but because the vendor chooses to acquiesce in it. Whatever may be the rights of these parties in a court of equity, it is certain no right can be derived by either in a court of law, from a contract declared void by statute.

Let the judgment be affirmed.

ENFORCEMENT OF CONTRACTS BECAUSE OF PART PERFORMANCE has no existence at law: See note to *Norton v. Preston*, 32 Am. Dec. 129-131. Payment is not a part performance so as to take a verbal contract out of the operation of the statute: See note to *Townsend v. Houston*, 27 Id. 745; also, note to *Houston v. Townsend*, 12 Id. 120; *Allen v. Booker*, 19 Id. 33. But suit may be brought on a parol contract for sale of land, fully executed, except paying the purchase money: *Linscott v. McIntire*, 33 Id. 602.

THE PRINCIPAL CASE IS CITED AND APPROVED in *Donaldson's Adm'r v. Waters' Adm'r*, 30 Ala. 181. In that case the court, commenting on the principal case and the case of *Cope v. Williams*, 4 Id. 362, in which it was decided that one who has made a parol contract for the purchase of land, paid one half of the purchase money, and retains the uninterrupted possession, cannot maintain an action against the vendor for the recovery of the money received by him, says: "But *Johnson v. Hanson*, even if apparently in conflict with *Cope v. Williams*, is really reconcilable with it. The only right of recovery asserted in *Cope v. Williams* was founded on the statute of frauds. The only ground of defense relied on in *Johnson v. Hanson* was founded on the same statute. The statute does not 'expressly and immediately vacate' a verbal contract for the sale of lands; it only precludes the bringing of an action to enforce it, by charging the vendee or his representatives, on the ground of such contract, and of some breach thereof. That description of action applied to the one brought in *Johnson v. Hanson*, but not to the one brought in *Cope v. Williams*. The statute expressly created the ground of defense which was relied on and sustained in *Johnson v. Hanson*; but it certainly did not create any such right of action as was asserted in *Cope v. Williams*, upon the facts shown in that case. In *Johnson v. Hanson* the express words of the statute were obeyed; in *Cope v. Williams*, none of its provisions were disobeyed: *Crosby v. Wadsworth*, 8 East, 803; *Lewis v. Whitnell*, 5 Mon. 191."

CRENSHAW v. DAVENPORT ET UX.

[6 ALABAMA, 390.]

PARTY OFFERING EVIDENCE APPARENTLY UNCONNECTED WITH THE ISSUE, if it is opposed, should show its connection with other facts, either in evidence or intended to be given, otherwise the court may lawfully reject it.

ASSUMPSIT by Davenport and wife on the common counts. Plaintiff's wife, Crenshaw, and others were devisees of an estate

in lands. The lands were sold, and the administrator, at the request of plaintiffs, delivered her portion of the proceeds of the sale to Crenshaw. The defendant offered in evidence a deed, executed by both the plaintiffs, releasing all the right, title, and interest of Mrs. Davenport in the above estate of lands. The introduction of the deed as evidence was rejected on the motion of plaintiffs. Defendant assigns this as error.

Gayle and Edwards, for the plaintiff in error.

Evans and Cook, contra.

By Court, GOLDTHWAITE, J. The exclusion or admission of evidence, which is supposed by one party to be relevant, and by the other is considered as irrelevant, is frequently a matter of some difficulty. The general rules on this subject are, however, believed to be sufficiently clear and precise to prevent any injustice from being done. When the relevancy is not apparent from the evidence offered, but other facts will make it so, the duty of the party offering it is to state its connection with the other facts, in order that its relevancy may be disclosed to the court: 2 Stark. Ev. 381. It is evident to every one conversant with the practice on the circuits, that a claim or defense frequently depends on a variety of facts and circumstances, either one of which, by itself, would seem to be irrelevant, and yet when the whole are made out, a complete case is presented; but it by no means follows, that a court will, in every case, wade through apparently irrelevant testimony, unless the intention to connect it with other facts, from which its relevancy will appear, is distinctly shown. When, therefore, evidence is offered, apparently not connected with the issue, and is opposed, it becomes the duty of the party offering it, to show its connection with other facts, either in evidence, or intended to be given to the jury. It is impossible to prescribe the course which counsel shall pursue in putting a case to the jury, but they must always be prepared to explain the object for which the evidence is offered; and if this is not done, the court may lawfully reject that which is apparently irrelevant. This is the clear rule to be deduced from the cases: *McGowan v. Bank of Kentucky*, 5 Litt. 272; *Harris v. Paynes*, Id. 105; *Wilson's Adm'rs v. Bower*, 5 Mon. 33; *Clark v. Beach*, 6 Conn. 142; *Rowt, Adm'r, v. Kile*, 1 Leigh, 216; *Benham v. Cary*, 11 Wend. 83; *Weidler v. Farmers' Bank*, 11 Serg. & R. 134; *Turner v. Fendall*, 1 Cranch, 41; *Innerarity v. Byrne*, 8 Port. 176; *Jackson ex dem. Webb v.*

Roberts, 11 Wend. 422; *Grats v. Grats*, 4 Rawle, 411; *Cow. & Hill's Notes*, 434, 792; *Mardis' Adm'rs v. Shackelford*, 4 Ala. 493.

Let us now apply these principles to the facts disclosed by the bill of exceptions in this case. The administrator of the estate in which the plaintiff's wife was entitled to a portion, had delivered the wife's portion of the notes received to the defendant. This delivery, unexplained, would impose a liability on him to account for the proceeds when received in money, but doubtless he could show that the delivery was the consummation of a sale. The deed was probably offered with this view; but as it bears date at a time subsequent to the delivery of the notes, and purports to be a release of the title to real estate, it was, when offered, apparently irrelevant to the point in issue. This being the fact, it was incumbent upon the defendant to show how it could become relevant by a connection with other facts or circumstances intended to be given in evidence. This was not done, and, therefore, the court properly rejected it.

Judgment affirmed.

EVIDENCE NOT CLEARLY IRRELEVANT WILL BE ADMITTED upon the assurance of counsel that it will become pertinent: *Davis v. Calvert*, 25 Am. Dec. 282, note 303. In *Winwall v. Ross*, 4 Port. 321, the court said: "If the competency of any matter as testimony depends upon some fact of which there is no proof, there is no error in rejecting such matter, when presented alone, and without an offer to prove what might make it competent evidence," citing *Olendenning v. Ross*, 3 Stew. & P. 267; *Gee v. Williamson*, 1 Port. 320. The principal case is cited to the effect that it is the duty of the party offering apparently irrelevant evidence, to state its connection with the other facts, that its relevancy may be disclosed to the court, in *Shield v. Henry*, 31 Ala. 56, and *Cuthbert v. Newell*, 7 Id. 458. To the same effect are the following: *Ashley's Adm'r v. Robinson*, 29 Id. 112; *Bilberry's Adm'r v. Mobley*, 21 Id. 277; *Abney v. Kingland*, 10 Id. 355; *Smith v. Armistead's Ex'rs*, 7 Id. 698; *Mardis' Adm'rs v. Shackelford*, 4 Id. 492; *Innerarity v. Byrne*, 8 Port. 176; *Hughes v. Stringfellow*, 15 Ala. 324.

GODFREY v. HAYS.

[6 ALABAMA, 501.]

EARNINGS OF A CHILD BELONG TO THE FATHER, and are subject to the payment of his debts, while the child remains a member of his family.

DETINUE for a slave. Hays, being a minor, contracted with his father to assist him in repairing his mill, in consideration of receiving a certain slave. After the conveyance of the slave to Hays, they both remained with the father, who afterwards failed, and the slave was sold under executions against him. The con-

veyance was in good faith, and the labor of the son a sufficient consideration. Judgment was given for the plaintiff, from which the defendant prosecutes this writ of error.

Boyd, for the plaintiff in error.

Smith, *contra*.

By Court, ORMOND, J. From the obligation of the father to support his children during minority, he is entitled to their services, and to the earnings of their labor. The right and the duty are reciprocal; for it can not be doubted, that if the father should refuse to support his child, and drive him from the parental roof, that he could not claim his earnings: *Nightingale v. Withington*, 15 Mass. 272 [8 Am. Dec. 101]. The law would be the same if the father should permit the child to labor for his own benefit; but in such a case, the child must cease to be a member of the family; the relative obligations of parent and child must cease—in the language of the case just cited, the child must be “emancipated.” In such a case, no doubt, the father might employ his child, and compensate him for his labor, and the product of his earnings would be beyond the reach of the creditors of the father, as they have no claim, legal or moral, on the labor of his child; but when the child is a part of the family, the product of his labor belongs to the father; and is, therefore, subject to the payment of his debts.

These principles are decisive of this case. Here, the son remained under the parental roof, and the family relation of father and child was not severed. The obligation of the father for maintenance, therefore, continued; and, as a consequence, he was entitled to the earnings of the son. If it were conceded that this contract could be enforced by the son against the father, it would avail nothing in this case. The father being entitled to his earnings, the conveyance of the slave on account of the labor of the child, was without consideration, and void as against creditors.

Let the judgment be reversed and the cause remanded.

THE PRINCIPAL CASE IS CITED AND APPROVED in *Stovall v. Johnson*, 17 Ala. 14. In that case it was held that the agreement of the father, in consideration of natural love and affection merely, to permit a minor son, who continued a member of his family, to cultivate a crop and receive its proceeds, is revocable by him at any time before the crop is gathered and sold by the son.

LANGDON v. ROANE'S ADM'R.

[6 ALABAMA, 518.]

WHERE AN ACCOUNT HAS BEEN SETTLED, BALANCE STRUCK, AND SECURITY GIVEN FOR ITS PAYMENT, a party complaining of fraud or mistake must allege it specifically and prove the allegation, before a court will allow him to unravel the account.

WHERE ACCOUNT IS MADE UP AND RENDERED, the party receiving it is bound to examine it. If he admits it to be correct, it becomes a stated account and binding on both parties; so, also, if he neither admits nor makes objection within a reasonable time, his silence will be construed into an acquiescence in its justness, and it becomes binding as a stated account.

COMPLAINANT WILL BE TAXED WITH COSTS where he could have obtained the relief to which he is entitled without a resort to equity.

BILL in equity, by the intestate of the defendant in error, for an accounting, and to enjoin a sale of slaves under a deed of trust; setting forth that Messrs. Lea & Langdon were commission merchants for the complainant from 1835 to 1838. That in November, 1836, Lea & Langdon presented their account, showing a balance of three thousand two hundred and sixty-eight dollars and seventy-nine cents in their favor. The complainant gave his note, at sixty days, for this sum, but soon after discovered several errors. That this note has since been taken up by the complainant. That Lea, of the firm of Lea & Langdon, on October 28, 1837, called on the complainant and demanded security for the repayment of various sums, including a note to Harding, which he claimed his firm had paid for complainant. That the latter, confiding in these statements, gave his note for three thousand two hundred and ninety-eight dollars and ninety-seven cents, payable the first of January, and executed a deed of trust of six slaves to William Chambers, with power to sell on the request of Lea & Langdon, to secure the payment of the said note. The answer admits the settlement in November, 1836, and the receipt of the three thousand two hundred and sixty-eight dollars and seventy-nine cents note, which they allege has been taken up by their carrying the amount due upon it to a new account, which they exhibit in their answer. The answer also admits the note of October, 1837, but denies that the payment of the Harding note, on which Walke is surety, was included in it, which note they admit they never paid. It also admits the deed of trust, but denies that there was any fraud in obtaining it. Walke's testimony was that Lea & Langdon told him they had paid the Harding note, and had received the note and deed of trust from complainant. Harding testi-

fied that he was present when Lea and complainant had a conversation. That Lea had no account with him, but referred to various sums his firm had paid, including the Harding note. That complainant then refused to give his note, unless an account was rendered. That the same evening Lea told him they had settled the account by note and a trust deed. The chancellor ordered and adjudged that the note and trust deed were obtained by fraud and misrepresentation, and that they be delivered up for cancellation. The other facts appear in the opinion.

W. M. Murphy, for the plaintiffs in error.

F. S. Lyon, for the defendant in error.

By Court, COLLIER, C. J. The frame of the bill does not require that the state of the accounts between the intestate and Messrs. Lea & Langdon, previous to the tenth of November, 1836, should be examined; for although the account rendered by the latter on that day, was not strictly correct, yet the error was admitted and corrected by the parties themselves: *Davis v. Spurling*, 1 Russ. & My. 64. We have only to inquire whether there was due to Lea & Langdon, on the twenty-eighth of October, 1837, the sum for which they received the intestate's note of that date? It can not be intended that there was a mistake in the settlement; and, consequently, the *onus* of showing an error prejudicial to the intestate, rests upon the complainant. Where parties have settled their accounts, and struck a balance, which has been adjusted by cash, or with a security for its payment at a future day, it is incumbent upon the party complaining of fraud or mistake, to allege it specifically, and to establish the allegation by proof. The agreement of the parties, which is admitted by the answer of Lea & Langdon, and proved by the deposition of Harding, that all errors should be corrected, and the deed of trust stand as a security for so much as was really due the *cestuis que trust*, can not render inapplicable the rule we have stated. That agreement was merely affirmative of what the law was, in the absence of any express understanding.

In *Chappedelaine et al. v. Dechenaux*, 4 Cranch, 306, the bill was filed to set aside a stated account, which was signed by the parties thereto upon a suggestion of fraud; or if it be not set aside, to correct its errors, and to obtain a settlement of transactions subsequent to that account. The account stated, was pleaded in bar of so much of the bill as required, that the subject should again be opened. The court said, that the plea

must be sustained, except so far as it may be in the power of the complainants to show clearly, that errors have been committed, is a proposition about which no member of the court has doubted for an instant. "No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony." To the same effect, see *Blackledge v. Simpson*, 1 Hayw. 259 [2 Am. Dec. 614]; *Phillips v. Belden*, 2 Edw. 1; *Bullock v. Boyd et al.*, Id. 293; *Wilde v. Jenkins*, 4 Paige, 481; *Endo v. Caleham*, 1 Youngs, 306.

It is said to be a general rule, that where an account is made up and rendered, he who receives it, is bound to examine the same, or to procure some one to examine it for him; if he admits it to be correct, it becomes a stated account, and is binding upon both parties—the balance being the debt, which may be sued for and recovered at law upon the basis of an *insimul computasent*. So, if, instead of an express admission of the correctness of the account, the party receiving it keeps the same by him, and makes no objection within a reasonable time, his silence will be construed into an acquiescence in its justness; and he will be bound by it as if it were a stated account: *Phillips v. Belden*, 2 Edw. 1. So, in *Freeland v. Heron et al.*, 7 Cranch, 147, it was held, that when one merchant sends an account current to another residing in a different country, between whom there are mutual dealings, and he keeps it two years without making any objections, it shall be deemed a stated account, and his silence and acquiescence shall bind him, at least so far as to cast the *onus probandi* on him. In fact, the rule as laid down by the authorities, would seem to be, that if one does not object to a stated account which has been furnished him, within a reasonable time, he shall be bound by it, unless he can show its incorrectness: *Murray v. Toland*, 3 Johns. Ch. 569; *Wilde v. Jenkins*, 4 Paige, 481.

In *Leaycraft v. Dempsey*, 15 Wend. 83, the court said, that where a bill is filed to open the settlement of an account, the request is not granted as a matter of course. If the account has been settled, or an instrument executed for the payment of the balance, the error should be specified in the bill. The plaintiff must show clearly, that he has been imposed upon, before the court will allow him to unravel the account. Such, also, is the decision in *Phillips v. Belden*, 2 Edw. 1. In the latter case, the court consider the distinction between surcharging and falsifying an account, and accounting generally. It is said,

where liberty is given to surcharge and falsify, the court takes the account to be a stated and settled account, and establishes it as such. If either party can show an omission for which an entry of debit or credit ought to be made, such party surcharges, that is, adds to the account; if anything be inserted which is wrong, he is at liberty to show it, and this is a falsification. The *onus probandi* is always on the party making the surcharge or falsification. But in a general accounting, the party producing the account to charge his adversary or relieve himself, must show the items to be correct.

The direct inference from the principles stated, is, that a party dissatisfied with a settled account, must in a bill brought for that purpose, state explicitly the grounds on which he seeks to surcharge or falsify it; and that the burden of making out the case, rests upon him. Further, where a merchant furnishes his customer with an account current of his dealings, and the latter retains it in his possession for a considerable length of time, without objection, he will be presumed to have admitted its correctness.

In the present case, the allegations of the bill are attempted to be sustained, by proof that Lea informed the intestate, he had paid for him, his note to Harding, as well as his drafts in favor of Harvey and Webb & Dugger; that this statement was wholly untrue; that intestate was deceived by it, and induced to make the note and execute the deed in question. The evidence of Harding goes to this extent, and so far as it respects his note, is confirmed by the testimony of Walke. Conceding that the proof on this point is sufficient to outweigh the answer, and it by no means follows that such a case is made out as will vacate the note and deed. The conclusion will not then be warranted, that the balance due the defendants, Lea & Langdon, was not equal in amount to the note. It will be remembered, Walke testifies, that although Lea told him, his house had paid the note to Harding, yet in the account which he showed him, it was not charged. Further, it is admitted in the bill, that Lea & Langdon, in February, 1838, furnished the intestate an account current of all previous dealings. True, it is alleged that this account is imperfect, not because it charges too much, or omits anything that is proper; but because, in noting the items stated, it is not sufficiently full and explicit. We infer that the account thus rendered, is identical with that exhibited with the bill. In fact, such an inference is a necessary sequence from the case as presented; for if they were variant from each other,

it would have been entirely competent for the complainant to have shown it; and he certainly would have done so, if the claim to relief could have been thus strengthened.

The account exhibited shows, that after placing to the intestate's credit the sum of seven hundred and seventy-one dollars and seventy-five cents, the proceeds of seventeen bales of cotton sold on the twentieth of January, 1838, there was due to Lea & Langdon, a balance equal to the amount of the note, saving six hundred and sixty-eight dollars and fifty-three cents, for which a credit was given. It is not alleged that the intestate paid the note which he made in November, 1836, in any other manner than by an appropriation of the proceeds of his cotton crop of that year; nor is it denied by the bill, that he did not, after the first settlement, continue to deal with Lea & Langdon as previously. Taking the case as stated by the complainant himself, and it is clear, that as the cotton sent by him to his factors, was insufficient to extinguish the note, there was due to them a balance thereon; and that that note, instead of being paid in full, was taken up by making so much as was due thereon, a part of the consideration of the note given in October, 1837. In this view, it is impossible that the intestate could have been charged with the note of Harding, and the defendants to Harvey, and Webb & Dugger; for taking the statements of the bill to be a true and complete development of the case, and the last note should have been for a much larger amount than it really is.

Again: The intestate received the account current of Lea & Langdon, in February, 1838, and retained it without objection, so far as we are informed, up to the time his bill was exhibited in January, 1839. This, considering the distance of the residence of the parties from each other, must be regarded as an implied admission that the account was correct. True, it would not operate so conclusively against the complainant, as to prevent him from surcharging and falsifying; but the proof in the cause is insufficient to authorize relief upon either of these grounds. In fact the interference of equity is not sought upon an objection to the account, but because the intestate was overreached by Lea, who represented to him that Lea & Langdon had made advances for him to pay debts which were still outstanding. The chancellor was of opinion that this allegation was made out by evidence, and that it warranted a perpetuation of the injunction; because it showed that the defendants, Lea & Langdon, had perpetrated a fraud upon the complainant.

Without stopping to inquire whether the proof was such as the court of chancery supposed, we are satisfied, that the conclusion there attained can not be supported.

Here it is admitted, and in fact proved, that all errors in the settlement were to be corrected, and the deed to stand as a security for so much as was really due. If the law were otherwise, this stipulation of the parties would sustain the deed, in despite of fraud on the part of the *cestuis que trust*, to the extent of their demand. But the chancellor's view of the law is incorrect, as applied to a case in the posture in which the present comes before us. It may be conceded as a general rule that the enforcement of a contract may be prevented, by showing a fraud on the part of him who seeks to derive a benefit from it; unless the fraud has been assented to, or acquiesced in. But it can not be endured that a debtor should be allowed to become an actor in equity, and avoid a security which he has given for a debt clearly due, merely because he was induced, by the false representations of the creditor, made most probably in ignorance of the fact, rather than from a settled purpose to deceive: See *Barnett v. Stanton & Pollard*, 2 Ala. 181. In respect to the notes of the intestate, discounted by the Branch Bank at Mobile, in 1838, the proceeds of which were checked out by Lea & Langdon, it is quite enough to say, that there is no allegation in the bill in respect to them; and even if the proof establishes a liability upon Lea & Langdon, to account for the money thus appropriated by them, that liability can not be enforced in the present case.

From what we have said, it results that the complainant is entitled to a perpetual injunction for the sum of six hundred and sixty-eight dollars and fifty-three cents, to be applied as a credit on the note on the twentieth of January, 1838; that as to the other matters in controversy, the bill must be dismissed. If Lea & Langdon are liable for the moneys checked out of bank, the representative of the intestate should have the benefit of them in extinguishment of the note and deed of trust; and that he may not be prejudiced in the assertion of his rights, the decree is so far modified, as to dismiss the bill without prejudice to the matter stated, as the ground of a new suit.

As it does not appear that there was a necessity for a resort to equity, to obtain the credit to which we have seen the complainant is entitled, the defendant in error will be taxed with the costs, both of this court and the court of chancery. The decree will accordingly be reversed, and here rendered in conformity to the views expressed.

ACCOUNT STATED IS CONCLUSIVE ON BOTH PARTIES until leave is given to surcharge, falsify, or open it: *Union Bank v. Knapp*, 15 Am. Dec. 182. A party having acknowledged the correctness of an account presented to him, is not estopped from showing that the acknowledgment was founded on a mistake, and that the account is incorrect: *Dickerson v. Nabb*, 2 Id. 725. The principal case is cited and followed in *Walker v. Driver*, 7 Ala. 683, to the effect that where parties have settled their accounts and struck a balance, it is incumbent on the party alleging fraud or mistake, to establish it by proof. It is also cited in *Bryan v. Ware*, 20 Id. 692, to the effect that an account received by one person, who neither admits its correctness nor makes objection, becomes a stated account; but that case holds that if the account was barred by the statute of limitations, such silence would not be sufficient to remove the bar of the statute.

MARTIN v. POPE ET AL.

[6 ALABAMA, 532.]

FACTOR HAS A LIEN FOR A GENERAL BALANCE OF ACCOUNTS, between himself and his principal, arising out of their dealings as principal and factor.

GENERAL LIEN OF FACTORS DOES NOT DEPEND UPON EXPRESS CONTRACT, but rests upon its manifest tendency to aid the interests of trade and commerce. It is presumed to exist until the contrary is established.

LEGAL INFERENCE, WHERE FACTOR MAKES ADVANCES, is, that they were made upon the joint credit of the personal security of the principal, and of the goods and money, that might come to hand. Factor may relinquish either without affecting his right to look to the other.

SURETY OF PRINCIPAL TO REFUND ADVANCES, CAN NOT COMPEL A FACTOR to assert his lien upon the goods or money of the principal, before proceeding against him personally.

INDULGENCE, NOT FOUNDED UPON A VALUABLE CONSIDERATION, given to a principal, will not discharge a surety.

ASSUMPSIT by Pope & Son upon a promissory note for two thousand two hundred and twenty-five dollars, given by Moffitt, with Martin and Horn as sureties. Verdict and judgment for one thousand and fifty-three dollars and thirty cents. Plaintiffs were commission merchants, and Moffitt a planter, who was in the habit of sending them his cotton crop to sell. In March, 1839, he obtained an advance of two thousand dollars, giving the note in suit, drawn at ten months. The next March he sent Pope & Son his crop, amounting to one hundred and thirteen bales, which they sold, returning an account of one thousand nine hundred and nine dollars and sixty-three cents for the proceeds thereof, but without showing how they had appropriated it. Moffitt requested that they would not sue for the balance owed them, to which they answered, "we shall be easy about

the balance you owe us, until next season, when we shall expect it." Subsequently to March, 1839, Moffitt became indebted to plaintiffs for various articles, in the aggregate sum of six hundred and thirteen dollars and eighty-seven cents, and three hundred and six dollars for hire of negroes, which last, it was proved, was not connected with the business of a commission merchant. These sums the plaintiffs claimed the right to retain out of the proceeds of the cotton, before applying it to the note. The judge charged that if Moffitt gave no directions for applying the money received from the cotton, the plaintiffs had the right to apply it to any item in their account, at any time. Also that the indulgence given Moffitt, not being founded upon a valuable consideration, would not discharge the sureties.

A. F. Hopkins, for the plaintiff in error.

J. A. Campbell, *contra*.

By Court, COLLIER, C. J. It is not pretended that there was a special contract between the plaintiffs and Moffitt, in respect to their transactions, which would vary the duties and liabilities of the former as the factors of the latter. We must then consider the case in reference to the principles of law applicable to such agents when dealing with their principals. The engagement of a factor who undertakes the sale of goods or merchandise, for a compensation, is, that he will faithfully dispose of the same, with a proper regard to the advices of his principal, and honestly account for the proceeds. He is entitled to a lien, not only upon the goods themselves, for advances, and for commissions consequent upon their proceeds, and for what may be due him upon a general balance of accounts growing out of similar dealings. This lien arises upon an agreement which the law implies in the absence of any express stipulation upon the subject: Paley on Agency, 127-129, 142-147; Story on Agency, 421, 435.

In *Houghton et al. v. Matthews et al.*, 3 Bos. & Pul. 485, it was decided that the demand for which the factor claimed a lien must be connected with and constitute a part of his dealings as such, with his principal; for if it was a species of debt foreign to that relation, or accruing before its commencement, the lien would not be enforced: Paley on Agency, 135-137; Story on Agency, 387-389. The correctness of these principles is conceded by both parties, but it is argued for the defendant, that the plaintiffs had a lien upon the cotton consigned to them by

Moffitt, and since its sale, upon the proceeds; that they can not relinquish their lien and resort to an action against the sureties of their principal, but must appropriate the money received by them to the payment of their account as factors, in the order in which the advances were made, or in which the respective sums charged became payable.

The general lien of factors does not depend upon any express contract, but rests upon its manifest tendency to aid the interests of trade and commerce, and to promote confidence and a liberal spirit on the part of factors in respect to advances to their principals. It is deemed to exist in all cases, until the contrary presumption is clearly established: Story on Agency, 388, 389; Paley on Agency, 127, 128. And where a factor makes advances, independent of an actual agreement to that effect, the legal inference is, that they were made upon the joint credit of the personal security of the principal, and of his goods and money that might come to hand. This being the case, the factor may relinquish his lien on the latter without at all affecting his personal remedy; so he may renounce his right to resort to the person, and look alone to his lien for reimbursement: *Burrell v. Phillips*, 1 Gall. 360; *Peisch v. Dickson*, 1 Mason, 9. It is then a right of which the factor, or his representatives, may avail themselves; but where there is no contract other than that which is implied, one who has become a surety of the principal, to refund advances made to him, can not elect for the factor, and force him (at least at law), to assert his lien upon the goods or money of the principal.

The case of *Brander & McKenna v. Phillips*, 16 Pet. 121, which was cited for the plaintiff in error, bears but little resemblance to that now before the court. In that case, the plaintiffs were the factors of Phillips & Co., sold cotton for them for two and a half per cent. commissions, and charged the same for advances. In August, 1834, Phillips & Co. were indebted to the plaintiffs in the sum of one thousand three hundred and fifteen dollars and fifty-seven cents for advances. On the fifteenth of the same month, the agent of the plaintiffs agreed to advance Phillips the sum of eight thousand dollars on bills to be drawn between the twentieth of April and thirty-first of July, 1835, by them, and any two of six persons named; among whom were R. H. and N. T., two of the defendants. Between the fifteenth of August, 1834, and the thirty-first of July, 1835, several shipments of cotton were made to the plaintiffs by Phillips & Co., and several bills were drawn by them, some jointly with R. H.

& N. T., and others without them; all of which were accepted by the plaintiffs. The bills and advances amounted to twenty-nine thousand seven hundred and ninety-five dollars and sixty-five cents, and the proceeds of the cotton amounted to twenty-two thousand four hundred and sixty dollars and forty-three cents. The proceeds of the cotton were applied to the bills drawn by Phillips & Co., to the exclusion of those drawn by them jointly with R. H. & N. T.; and the question was, whether, if the plaintiffs had sufficient funds of Phillips & Co. in their hands, when these latter bills became due, to pay them, they were not bound to pay them, instead of retaining it for the payment of those which subsequently matured. The court said: "The application of payments by the creditor, where no direction is given by the debtor, has no relation to the present case. Had the bills become payable at the same time, on acceptances made on the same day, the plaintiffs might have insisted on applying the funds in their hands to the payment of the notes without securities. But this would have been a very different case from the one now before us. After having accepted the bill under consideration, payable at a time stated, the plaintiffs accepted other bills, payable at a more remote period. Now, the contract by the acceptors was, that they would pay these bills as they respectively became due. And this they were bound to do so long as the funds of the consignors in their hands remain unexhausted. A bill became extinguished as soon as it was paid by the plaintiffs with the funds of Phillips & Company. And this principle applies as strongly to those bills signed by the accommodation drawers, as others." Again: "The plaintiffs, by appropriating the proceeds of the cotton to the payment of future liabilities, have violated their contract, endeavored to defeat the just reliance of the sureties, and charge them with the payment of the bills which they guaranteed. This the plaintiffs can not do. It would be a great hardship, if not a fraud on the sureties. No lien can be regarded or enforced under such circumstances. The lien of a factor depends upon legal principles, founded on equitable considerations, and can be held valid on no other grounds."

This case merely determines, that the acceptor of bills is bound to pay them at maturity; that if in funds of the drawer, he should use them for that purpose; and where they became payable at different times, he can not use his own funds to pay those that first mature, and pay those subsequently falling [due] with the money of the drawers, so as to entitle him to recover

the amount of the former, of persons who joined as sureties in drawing them. There, the factors, by their acceptance, came under obligations to pay money at an appointed day, and being in funds of the persons for whom they had undertaken, it was their duty to appropriate them. Here, they had entered into no such engagement. They had merely advanced money to, and had allowed one of their customers to become indebted to them, by furnishing him goods, etc.; and this without any contract, though doubtless in the expectation that he would send them cotton. The several sums in which he was indebted, must be considered as constituting his liability to them, and stand upon an equal footing so far as the present case is concerned. This conclusion, as it respects the note in question, results from the absence of any contract varying the rights and obligations of the sureties; and in regard to the charge for negro hire, it is immaterial whether it arises out of the plaintiffs' dealings, as factors, with Moffit, and could only be material, if they were asserting a lien upon the cotton or its proceeds. But the question of the right of lien, or the duty of the factors to exert it, can not be raised in this case. Moffitt's cotton has been sold by them, and its proceeds appropriated *pro tanto* to extinguish his indebtedness, without any objection, of which the record informs us, either by himself or his representatives. It is, then, the case of a creditor paying money to his debtor without any specific direction as to its application.

It is laid down generally, that where money is paid by a debtor to a creditor, who has several demands against him, without directing how it shall be applied, the creditor may apply it as he pleases: *Smith v. Screven*, 1 McCord, 368; *Goddard v. Cox*, 2 Stra. 1195. See, also, *Newmarch v. Clay*, 14 East, 242. In *The Mayor etc. of Alexandria v. Patten et al.*, 4 Cranch, 317, the court say: "It is a clear principle of law, that a person owing money on two several accounts, as upon bond and simple contract, may elect to apply his payments to which accounts he pleases; but if he fails to make the application, the election passes from him to the creditor. No principle is recollected which obliges the creditor to make this election immediately. After having made it, he is bound by it, but until he makes it, he is free to credit either the bond or simple contract." To the same effect is *The United States v. January & Patterson*, 7 Cranch, 572.

In *Gwinn et Ux. v. Whitaker's Administratrix*, 1 Har. & J. 754, it was determined, that where one is indebted upon several ac-

counts, and makes a payment without directing its application, if both the securities carry interest, or neither bears interest, the creditor may apply it. So, if one is indebted on bond or mortgage, and simple contract, the law, in the absence of direction from the debtor, will apply a payment to the bond and mortgage. Further, it was said, that sometimes the fund, out of which the money arose, will direct the application; as where one indebted on bond and on judgment sells his land, and the purchaser pays a sum of money to the creditor without applying it, the law will apply it to the judgment, so as to exonerate the land.

In *Allston's Administrator v. Contee's Executor*, 4 Har. & J. 351, a debtor made a payment to a creditor, who had two claims, on open account, without directing its application: under the circumstances, the court thought the money should go in extinguishment of the oldest account. And in *Bacon v. Brown*, 1 Bibb, 334 [4 Am. Dec. 640], it was decided, that if the debtor does not apply a payment, the creditor may direct its application to any one of several demands where they are of equal dignity, parallel in their consequences, and charge upon the debtor. That equity would direct a payment to be applied to debts bearing interest, but the creditor can not apply it to a demand not yet payable. See also *Heyward v. Lomax*, 1 Vern. 24. The inference from the facts recited in the record is, that all the items composing the plaintiff's account were for money due them before they had sold all the cotton consigned them by Moffitt; as the last charge is dated on the twenty-first of March, 1840, and the cotton was sold on the seventeenth of that month and in April following. Again; they are all of equal dignity as it respects priority of payment; and from the time the plaintiffs were entitled to be paid, they drew interest in the same manner, whether evidenced by writing or not.

As it respects the sum of one hundred and twenty-four dollars and fifty cents, paid Moffitt by the plaintiffs, defendant can not object that it should have been credited to Moffitt's account. And whether it had been thus previously credited or not, is wholly immaterial; for they subsequently sold for Moffitt between six and seven hundred dollars' worth of cotton, that was placed to his credit, which we have seen the plaintiffs might have paid over to him without affecting their claim against the defendant. The form in which the account was stated can not prejudice either party: courts of justice will look at the substance of the thing. The facts do not show that there was a valid agreement between the plaintiffs and Moffitt, by which the

former was to extend the day of payment of the note in controversy; what the plaintiffs said to him was entirely gratuitous, and they could have put the note in suit at any time after its maturity.

Without extending this opinion, by a particular examination of the charges given and refused, it will be readily perceived from what has been said, that no error has been committed which is available for the defendant below. The judgment is consequently affirmed.

FACTOR HAS A LIEN ON THE GOODS of his principal in his possession for a general balance due on account: See *Patterson v. McGahey*, 15 Am. Dec. 296, and note

BANK OF MOBILE ET AL. v. HALL.

[6 ALABAMA, 689.]

RECEIPT OF NEGOTIABLE INSTRUMENT IN PAYMENT OF A PRECEDENT DEBT IS IN THE USUAL COURSE OF TRADE. If received before due, and without notice of an equity between the original parties, the holder is not affected by such equity.

NEGOTIABLE INSTRUMENT RECEIVED AS AN INDEMNITY AGAINST POSSIBLE FUTURE LOSS, even though that loss afterwards actually occur, is not taken in the usual course of trade. It remains subject to latent equities between the original parties.

BILL in equity by Hall against the plaintiffs in error, that an account be taken, and that they be restrained from suing or negotiating certain notes, and that the notes be produced and canceled. Hall purchased from Andrews certain premises, giving his four several notes, payable in one, two, three, and four years. Andrews' deed covenanted that he had a good title, free from incumbrances. After the payment of the first note Hall found that the premises were incumbered by a mortgage amounting to over half of the purchase price, which he was obliged to purchase in. The bank received the second note from Andrews and credited him with so much toward his indebtedness to it. Hallett, the president of the bank, received the note, payable in three years, from Andrews, to indemnify him as surety for Andrews in a bond for title to a lot in Mobile sold by Andrews. The chancellor, believing the equity of complainant to be superior to that of the bank and of Hallett, and that he had a right to retain out of the purchase money the amount paid by him to extinguish the incumbrance, as Andrews was insolvent and had absconded, directed the master to state an account between the parties.

Phillips and Dargen, for the plaintiffs in error.

Campbell and Gibbon, for the defendant in error.

By Court, OXMOND, J. The notes of the defendant in error, out of which this controversy arises, being payable in bank, are to be governed by the rules relating to inland bills of exchange; and being transferred by indorsement to the plaintiffs in error before they were due, and without notice of the equity now attempted to be set up, the only question is, whether the indorsees received them in the usual course of trade.

In *Bay v. Coddington*, 5 Johns. Ch. 54 [9 Am. Dec. 268], it was held, that receiving negotiable paper as a guaranty or indemnity against future responsibilities, as an accommodation indorser for the person from whom it was received, was not in the usual course of business or trade. That to be so, it must have been received in payment of an antecedent and existing debt—for cash or property advanced, debt created, or responsibility incurred on the strength and credit of the paper. Since that time, the decisions of the supreme court of New York seem to have vibrated on this question, so that, in the language of Mr. Justice Story, in *Swift v. Tyson*, 16 Pet. 1, it is difficult to ascertain what the law of that state is on this subject. See *Wardell v. Howell*, 9 Wend. 170; *Rosa v. Brotherson*, 10 Id. 85; *Ontario Bank v. Worthington*, 12 Id. 593; *Payne v. Outler*, 13 Id. 605; *Bank of Sakina v. Babcock*, 21 Id. 499; *Bank of Sandusky v. Scoville*, 24 Id. 115. In the case referred to in 16 Peters, this question came before the supreme court of the United States, and it was there held, after a review of all the authorities, English and American, that the receipt of a negotiable instrument in payment of a precedent debt was, in the usual course of trade; and if it was received before it was due, and without notice of an equity between the original parties to it, the holder was not affected by it. Such was the decision, also, in *Brush v. Scribner*, 11 Conn. 888 [19 Am. Dec. 303], and such appears to be the received doctrine of the English courts.

We agree entirely with the doctrine as thus stated. It appears to us there is no sensible distinction between receiving a bill in payment of a pre-existing debt, and purchasing it with money or property. In either case, the consideration is a valuable one; and all the reasons which apply to protect the holder against latent equities between the original parties of which he had no notice, apply with the same force in the one case as in the other. This is conclusive as to the note held by the bank

of Mobile. The bank received the note absolutely and unconditionally in payment of a debt, and relinquished the security thus paid off. The bank is then a holder of the note, received by indorsement before its maturity, and without notice of the equity of Hall, for a full and valuable consideration, and upon the well-established principles of the law merchant, is not affected by the latent equity existing between the original parties.

Something was said in argument about the title of the bank to the note, and the authority of Hallett to act as its agent in obtaining it. It is not a matter of any moment whether Hallett had authority, in the first instance, to make the negotiation with Andrews or not, as his acts, as such agent, have been ratified by the bank. Hallett, the holder of the other note, does not stand in the same predicament. He, it appears, was the surety of S. Andrews in a bond for title to a lot of ground, in the city of Mobile, to the Planters and Merchants' Bank, the lot being incumbered by a mortgage to one Hagan, and that he received the note from Andrews to indemnify him and save him harmless from loss on his suretyship; that he has since been compelled to discharge the incumbrance.

It appears to us, that this note was not received in the usual course of trade between merchants, so as to protect the holder against a latent equity. In the case of *Swift v. Tyson*, 10 Pet. 1, already referred to, the court expressed their opinion, that a note received as collateral security for an existing debt, is received upon a valuable consideration in the usual course of trade. That point, however, did not arise in the cause, and the expression of an opinion upon it for that reason, was objected to by Mr. Justice Catron. In *Cullum v. The Branch Bank of Mobile*, 4 Ala. 21 [37 Am. Dec. 725], this court intimated that the taking a note as collateral security for the payment of a debt, would not be such a transaction as would shut out the equities between the original parties, but the opinion is expressed, that a new consideration, "such as the discharge of other paper, or of other parties," would produce that result. This point, however, was not involved in that case. Here, when this note was received, there was no debt existing between Hallett and Andrews, but a mere contingent liability on the part of the former, to pay a debt in future for the latter; it was not then received even as collateral security for a debt then existing, but was received as an indemnity against possible future loss.

No case has been cited, which goes the length here contended for, and it can not be said with any propriety, that such a trans-

action is a dealing in the usual course of trade. It will not be contended that Hallett can resist the equity of the maker of the note against his assignor, on any other ground than the actual payment of the security debt, against the payment of which, it was intended as an indemnity; yet, this right to hold the note, discharged from the equities between the original parties to it, if it existed at all, must have attached to it at the moment it was indorsed, and could not depend upon some future act to be performed by the indorsee, and depending for its performance on his volition; otherwise, it might happen that he would collect the note, and never pay the surety debt.

Such being the aspect of the case, and the inquiry into the equity between the original parties being opened, how would the case stand as between them? Upon this point, there can be no doubt. The case of *Cullum v. The Branch Bank of Mobile*, previously cited, is an authority full to the point, that if the incumbrance was concealed by the vendor at the time of the sale, equity would relieve the purchaser from the payment of the purchase money *pro tanto*, on the ground of fraud, although the incumbrance was of record, and there was a warranty against incumbrances. And further, that when a purchaser with warranty is evicted by a title to which his covenants do not extend, and the vendor is insolvent, equity will restrain him from recovering the purchase money. This is decisive as to the equity of Hall, whether the warranty of the vendor is against incumbrances or not; or whether the incumbrance was concealed at the time of the sale of the land, which appears to be the true aspect of the case upon the record. Hallett being in no better condition than his assignor, but subject to the same equity, can not recover on the note.

It results from the opinion here expressed, that the decree of the chancellor must be reversed, as it respects the Bank of Mobile, and the cause be remanded for further proceedings, not inconsistent with this opinion. Costs adjudged in favor of the Bank of Mobile against Hall, and against Hallett and in favor of Hall.

BOA FIDE HOLDER OF NEGOTIABLE INSTRUMENTS, WHO IS: See note to *Ayer v. Hutchins*, 3 Am. Dec. 235; for New York doctrine, see note to *Bay v. Coddington*, 9 Id. 272; right to recover, see note to *Sims v. Lyles*, 28 Id. 156.

"USUAL COURSE OF TRADE" means taken as payment of a debt contracted at the time, and not as security for precedent debt: See *Coddington v. Bay*, 11 Am. Dec. 342; or given for money, goods, or credit, or on account of some loss or liability incurred: See *Kimbrow v. Lytle*, 31 Id. 586; in payment of a pre-existing debt is: See *Homes v. Smyth*, 33 Id. 650.

DESHA ET AL. v. POPE ET AL.

[6 ALABAMA, 690.]

HERE AGREEMENT TO SHIP GOODS IN SATISFACTION OF ANTERIOR ADVANCES will not give the factor or consignee a lien upon them for his general balance until they come to his actual possession.

SPECIFIC PLEDGE OR APPROPRIATION OF GOODS, WITH INTENT THAT THEY SHALL BE A SECURITY OR PAYMENT, vests the property in them, as soon as deposited with a bailee, in the person to whom they are to be delivered.

CLAIM of property by Desha, Sheppard & Company levied on by sheriff under an execution in favor of Pope & Son against one Alexander. The property, consisting of eighteen bales of cotton, had been stored in a warehouse, but by order of Alexander was shipped to D., S. & Co., to whom he was indebted for advances, for the express purpose of paying them as far as it would go. As soon as the steamer reached its destination, the cotton was levied upon by the sheriff, being the next day after the execution came into his hands and three days after the shipment. D., S. & Co. paid the freight, and the cotton was received on the wharf by the public weigher, for them, before it was levied upon. The court charged, that if the execution came to the hands of the sheriff before the cotton, or the bill of lading for it came in the actual possession of the claimants, the lien of the execution bound the cotton. The court refused to charge, that if the cotton was shipped by Alexander to D., S. & Co., as factors, for the payment of advances, and the bill of lading was delivered on the boat to be delivered to them, such delivery of the cotton and bill of lading to the carriers was constructive delivery to the claimants as of the day of shipment. Judgment by plaintiffs and against the claimants for six hundred and fifty dollars, the value of the cotton.

Stewart, for the plaintiffs in error.

Campbell, *contra*.

By Court, GOLDTHWAITE, J. If the claimants of the cotton levied on in this case, stood in the relation of factors only, it is clear upon principle, that their lien for the balance due them, could not attach until the cotton was in their actual possession: *Kinloch v. Craig*, 3 T. R. 119; *Bruce v. Wait*, 3 Mee. & W. 15; cited Cross on Liens, 254. The reason for this is, that they have no property in the goods by the mere act of shipment, although they are named in the bills of lading as the consignees. By itself, the bill of lading does not operate as a transfer of the

goods; but is rather to be considered as evidence, or as an act raising the presumption of such a transfer: Ab. Sh. 375; *Coxe v. Harden*, 4 East, 211; *Haille v. Smith*, 1 Bos. & Pul. 563.

But it appears, from the evidence set out in the bill of exceptions, that, independent of the relation between the claimants as factors, and Alexander, the defendant in execution, the cotton was shipped expressly to pay them, so far as its proceeds would go, for advances previously made by them; and the bill of lading was transmitted to them. Under these circumstances, the shipment must be considered as a specific appropriation of the cotton for the security of the claimants. This appropriation did not rest in intention merely, for it was executed, so far as the defendant in execution was concerned, by the transmission of the bill of lading to the consignees. The debtor could have made an assignment, or other valid transfer of the title to this cotton, for the security of the claimants at any time, before the lien of the plaintiff's execution attached, and there is no sound reason which should prevent the bill of lading from producing the same effect after its transmission, and when the shipment was expressly made for this purpose. This is the effect of the cases of *Haille v. Smith*, 1 Bos. & Pul. 563, and *Anderson v. Clark*, 2 Bing. 20, as well as that of *Grosvener v. Phillips*, 2 Hill (N. Y.), 147. Nor is this principle contradicted in any of the cases cited by the counsel for the plaintiffs; indeed, in some of them, it is expressly conceded: *Kinloch v. Craig*, 3 T. R. 119; *Mitchel v. Ede*, 11 Ad. & El. 888; *Nichols v. Clent*, 3 Price, 547.

Although in theory, the principle stated is perfectly obvious, there may be some difficulty in applying it to the facts of some cases; we shall, therefore, endeavor to state it so that it can not be misunderstood. The mere agreement to ship goods in satisfaction of antecedent advances, will not, in general, give the factor or consignee a lien upon them, for his general balance, until they come to his actual possession; but if there is a specific pledge or appropriation of certain ascertained goods, accompanied with the intention that they shall be a security, or the proceeds as a payment, and they are deposited with a bailee, then the property is changed, and vests in the individual to whom they are to be delivered by the depository: *Cross on Liens*, 253.

The result of our opinion is, that the circuit court erred in refusing to give the charge requested by the claimants; the judgment is, therefore, reversed, and the cause remanded.

LANGDON v. LOCKETT.

[6 ALABAMA, 727.]

BALANCE REMAINING IN HANDS OF REGISTER IN CHANCERY MAY BE GARNISHED as the property of the defendant in execution, where he has been ordered to sell land and pay off a mortgage, even though he has not yet reported to the court and the sale been confirmed.

GARNISHED process against Lockett, who had one hundred and forty-three dollars remaining in his hands from a sale of the lands of Madison College, ordered at the last term of the chancery court to be made by him, as master and register of said court, and report at the next term not yet held. The court discharged the garnishee upon the facts, which is assigned as error.

Graham, for the plaintiffs in error.

Davis, *contra*.

By Court, GOLDTHWAITE, J. We have several times had before us the question here, for individuals connected as officers with courts of justice, are liable to process of garnishment from other courts. Thus we have held that a sheriff can not be garnished for moneys collected, at the suit of a creditor of the plaintiff in execution: *Zurcher v. Magee*, 2 Ala. 253. Also, that an attorney or justice of the peace, having collected money in their respective characters, may be garnished: *Mann v. Buford*, 3 Id. 312 [37 Am. Dec. 691]; *Clark v. Boggs*, 6 Id. 809 [post, 85]. It is argued by the counsel for the defendant in error, that an officer of one court can not be called before another to contest any matter respecting money collected under legal authority. This is unquestionable, when from the nature of the case, or from the circumstances attending it, the money can be drawn into litigation in the court from whence the process issued; but it does not apply to those cases where there can be no litigation of that nature. The investigation which may be had into the correctness of a sale, is not in any sense a contest with respect to the money or the right to it. Every court possesses the inherent power to prevent abuse of its own process, by setting aside fraudulent or even oppressive sales: *Mobile Cotton Press v. Moore*, 9 Port. 679. But this does not divest the right of the defendant in execution to the excess of money arising from the sale of his property, after satisfying the process. The question may be undetermined, whether the sale is valid or invalid, yet the money is *prima facie* due to the defendant in execution, in the same manner as it is upon an express promise

to pay; and this *prima facie* right is subject, in our opinion, to the process of garnishment. This is the effect of the decision in *Day v. Becher*, 1 McMullen, 92; and also in *Watson v. Tidd*, 5 Mass. 271; in which latter the marshal of the United States was held liable to trustee process, for a balance remaining in hands after satisfying the process held by him against the goods of the common debtor.

There is a strong reason why the process should be effectual in a case like this, because the debtor may, at any time after the sale, demand and secure the money from the officer; and if it could not be attached, suitors would be entirely remediless. On the other hand, no injury can arise to the officer, for it is in his power at all times to pray the court before which the process of garnishment is returnable, to suspend its action until any question respecting the regularity of the sale is determined. In the present case, no objection of this nature is interposed, and we must intend that no just cause for exception existed.

Our conclusion is, that the judgment is erroneous, and therefore, it is reversed and remanded.

SURPLUS REMAINING IN THE HANDS OF A CONSTABLE after satisfying executions is subject to be attached as the property of the defendant in execution: See *King v. Moore*, *ante*, 44, and the Alabama cases there collected; also *Clark v. Boggs*, *post*, 85.

STATE v. MURPHY.

[6 ALABAMA, 765.]

IT IS A CONSPIRACY, AND PUNISHABLE BY LAW, FOR SEVERAL PERSONS to persuade a maiden lady, her father and mother, that a forged license is genuine, and that one of their number is a justice of the peace, and thus gain the consent of such father, mother, and daughter to the marriage of the latter.

RAPE CAN ONLY BE COMMITTED BY FORCE; if the woman consent in the belief that an illegal marriage is legal, upon the fraudulent assertion of the pretended husband, the latter will not be guilty of rape.

CONSPIRACY TO COMMIT A CRIME IS MERGED IN THE CRIME UPON ITS EXECUTION, only when the crime is of a higher grade than the conspiracy. Where two crimes are of equal grade, there can be no legal, technical merger.

INDICTMENT for conspiracy, charging that the defendant, and others particularly named, did, etc., conspire to seduce, etc., one Temperance Buckalow, and to enable one of their number, John Henry Watts, to effect a pretended marriage with her and gain

her own and her father's and mother's consent thereto, in the belief that it was legal, and thereby enable said Watts to carnally know the said Temperance Buckalow without legal matrimony between them. And further charging that the said conspirators did repair to the house of John Buckalow, the father of Temperance, and falsely represent to him, his wife, and daughter Temperance, that said Watts had a marriage license from the county clerk, giving authority to any person, legally authorized, to solemnize the marriage of said Watts and Temperance; that one of their number represented himself as being a justice of the peace, and did then and there unlawfully marry the said Watts and Temperance, and the said Watts thereupon went to bed with her, the said Temperance, etc. The defendant was found guilty, but the court below referred the case to this court to pass upon the questions discussed in the opinion.

The attorney general, for the state.

Gayle, for the defendant.

By Court, COLLIER, C. J. The indictment, it is believed, is sufficiently precise and direct in its allegations, so that the question is, whether the offense it attempts to charge is punishable by law. A conspiracy is said to be a consultation or agreement between two or more persons, either falsely to accuse another with a crime punishable by law, or wrongfully to injure or prejudice a third person, or any body of men in any other manner; or to commit any offense punishable by law; or to do any act with intent to prevent the course of justice; or to effect a legal purpose with a corrupt intent, or by improper means: 1 Hawk. P. C., c. 27, sec. 2 *et post*; Archb. Crim. Pl. 390, 391; 4 Bl. Com. 136, n. 31; 3 Chit. Crim. Li. 1139; 2 Russ. on Crimes, 553. In *Taylor & Robinson's Case*, Leach's Crim. L. 89, a woman living in the service of her master, conspired with another man that he should personate her master, and in that character should solemnize a marriage with her; which was accordingly done, for the purpose of afterwards raising a specious title to the property of the master. The gist of the indictment was for the conspiracy, and the conviction was founded on that ground. It was considered that, although no actual injury was proved, yet it was the province of the jury to collect from all the circumstances of the case, whether there was not an intention to do a future injury to the person whose name was assumed. So a conspiracy to seduce a daughter from her father's house, etc., has been held to be an indictable offense: *Rex v. Lord Grey et*

al., 1 East's P. C., c. 11, sec. 10; *Rex v. Sir Francis Blake Delaval et al.*, 3 Burr. 1434.

In *The State v. Buchanan*, 5 Har. & J. 317, 368 [9 Am. Dec. 534], the law applicable to conspiracy as a criminal offense is most elaborately and learnedly considered. The conclusions of the court are, that an indictment will lie at common law: 1. For a conspiracy to do an act not illegal, nor punishable, if done by an individual, but immoral only; 2. For a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose, which has a tendency to prejudice the public; 3. For a conspiracy to extort money from another, or to injure his reputation by means not indictable if practiced by an individual, or by verbal defamation, and that whether it be to charge him with an indictable offense or not; 4. For a conspiracy to cheat and defraud a person by means of an act, which would not in law amount to an indictable cheat, if effected by an individual; 5. For a malicious conspiracy to impoverish or ruin a third person in his trade or profession; 6. For a conspiracy to defraud a third person by means of an act not *per se* unlawful, and though no person be thereby injured; 7. For a bare conspiracy to cheat or defraud a third person, though the means of effecting it should not be determined on at the time; 8. That a conspiracy is a substantive offense, and punishable at common law, though nothing be done in execution of it; 9. That in a prosecution for a conspiracy, it is sufficient to state in the indictment, the conspiracy and the object of it; the means by which it was intended to be accomplished need not be set out, being only matters of evidence to prove the charge, and not the crime itself. See, also, *Commonwealth v. Judd et al.*, 2 Mass. 329 [3 Am. Dec. 54]; *State v. Rikey et al.*, 4 Halst. 293; *Commonwealth v. Tibbetts*, 2 Mass. 536; *Commonwealth v. Warren*, 6 Id. 74; *Commonwealth v. Davis*, 9 Id. 415; *The King v. Edwards*, 8 Mod. 320; *Rex v. Eccles et al.*, 13 East, 230; *The King v. Nichols*, Id. 412, note; *Lambert v. The People*, 9 Cow. 578; 3 Chit. Crim. L. 1139 *et post*, and cases there cited.

In the case before us, it is explicitly alleged, that the object of the conspirators was to impose on Temperance Buckalow, and her father and mother, by inducing them to believe that a forged license was genuine, and that one of their number was a justice of the peace authorized to celebrate the rites of matrimony; and thus obtain the consent of the father, mother, and daughter to the marriage of the latter, etc. Whether the act contemplated would be illegal or punishable if done by an im-

dividual, we need not consider; for it is clear that it was eminently immoral, and intended to deceive and defraud, and this is quite sufficient to constitute the offense of conspiracy. Conceding, for the purposes of this argument, that the espousals may be celebrated and the matrimonial connection formed without the authority of a license first obtained from the clerk, and still the defendant may be guilty. Miss Buckalow might (as every woman should) have refused to unite her fortunes with a lover, unless the appropriate office furnished record evidence that the conjugal relation was duly consummated between them. So the assent of the parents may have been yielded to the formation of this most important relation, upon the condition that it was celebrated according to the directions of the statute. The deception practiced by means of the forged license, and misrepresenting the official character of the person who undertook to repeat the marriage ceremony, when considered in its consequences, is a high offense against morals; and merits the full measure of reprehension with which it is visited by the law.

It is insisted for the defendant, that although the conspiracy may have been an indictable offense, yet having been consummated by the commission of a felony, the conspiracy is merged in the act which was done, and is no longer punishable as a misdemeanor. The indictment does not allege a carnal knowledge by force, but merely that the purpose of the conspirators was effected by fraud. It is an essential constituent of the crime of rape, that the act should have been committed by force and against the will of the female: 4 Bl. Com. 210; 3 Chit. Crim. L. 810; 1 Russ. on Crimes, 556 *et post*, and cases there cited; 1 Hawk. P. C. 121 *et post*. If a woman be beguiled into her consent by marrying a man who had another wife living, or by causing the nuptials to be illegally celebrated and persuading her that the directions of the law had been observed; in neither case will the pretended husband be guilty of a rape. There are cases which lay down the law in general terms, that wherever the consent is obtained by fraud, the crime has not been committed: *Regina v. Saunders*, 8 Car. & P. 265; *Regina v. Williams*, Id. 286; 3 Chit. Crim. L. 810; *Commonwealth v. Fields*, 4 Leigh, 648.

In *The People v. Mather*, 4 Wend. 265 [21 Am. Dec. 122], the court say: "It is supposed that a conspiracy to commit a crime is merged in the crime when the conspiracy is executed. This may be so where the crime is of a higher grade than the conspiracy, and the object of the conspiracy is fully accomplished; but a con-

spiracy is only a misdemeanor, and when its object is only to commit a misdemeanor, it can not be merged. Where two crimes are of equal grade, there can be no legal technical merger." In the case of *The Commonwealth v. Kingsbury et al.*, 5 Mass. 106, the defendants were charged with the fraudulent removal of goods upon a conspiracy previously formed, under such circumstances as made them guilty of a felony. The question was raised whether the defendants could be prosecuted for the conspiracy, and the court was of opinion that if the conspiracy had not been effected, it might have been punished as a distinct offense; "but a contrivance to commit a felony, and executing the contrivance, can not be punished as an offense distinct from the felony, because the contrivance is a part of the felony, when committed pursuant to it. The law is the same respecting misdemeanors. An intent to commit a misdemeanor, manifested by some overt act, is a misdemeanor; but if the intent be carried into execution, the offender can be punished but for one offense." The latter branch of the quotation must be regarded as a mere dictum of the court. Having determined that the act done was a felony, and for that reason the conspiracy was merged, the case did not require an opinion as to what would be the effect of the act upon the conspiracy under which it was consummated, where it was a misdemeanor of equal grade with the conspiracy itself. The case cited from Wendell is more consonant with principle, and we do not hesitate to recognize it as authoritative. What offense was committed by the marriage? This, we have seen, when followed by the consequences alleged in the indictment, did not amount to a rape. We can only regard it as merely carrying out the conspiracy which was an offense in itself whether consummated or not.

We have said that the guilt of the conspirators can not be affected by the validity of the marriage between Miss Buckalow and Watts, and perhaps we should be going beyond what strict duty requires, were we to consider whether, what transpired, established the relation of husband and wife. It may, however, be remarked, that the solemnization of the contract of espousal is *non juris naturalis aut divini*, but it is *juris positivi*: Calmet's Dict. Marriage, tit. Marriage; Watson's Dict., Marriage, 621, 622; Steph. Com. 286; Shelford's Law of Mar. 3 *et post*, and notes. See, also, the authorities cited below. Marriage, then, being a civil contract, may it not be consummated by persons of competent age, etc., *per verba de præsenti*, where there is no statute which impliedly or expressly declares it void if not solemn-

nized according to express forms? Are not our statutes in respect to marriage directory rather to the officer who is authorized to issue a license, and the functionaries who are to celebrate it, than to the parties who enter into this relation? If this be so, could Watts be heard to object that he had not taken Miss Buckalow for his wife, if they both, in answer to the usual questions, assented to a union? Whether she might not, if overreached by misrepresentation and fraud, repudiate him, is another question: Clay's Dig. 372, 374; *Londonderry v. Chester*, 2 N. H. 268 [9 Am. Dec. 61], and cases there cited; *Dumaresly v. Fishly*, 3 A. K. Marsh. 368; *Fenton v. Reed*, 4 Johns. 52 [4 Am. Dec. 244]; *Jackson v. Winne*, 7 Wend. 47; *Milford v. Worcester*, 7 Mass. 48; 3 Ph. Ev., C. & H.'s notes, 1147; Shelford's Law of Mar. 3-38; *Newbury v. Brunswick*, 2 Vt. 160 [19 Am. Dec. 703]; *Cram v. Burnham*, 5 Greenl. 216 [17 Am. Dec. 218]; *Hantz v. Sealy*, 6 Binn. 405; *Jackson v. Claw*, 18 Johns. 346; *Bashaw v. State of Tennessee*, 1 Yerg. 177; Reeve's Dom. Rel. 196, 200, 290; *Pearson v. Howey*, 6 Halst. 17, opinion of Ford, J.; 4 Kent's Com., 4th ed., 74-93, and citations there made.

Without undertaking to consider the questions we have stated, we have thought it proper to propose them and cite the authorities by which they may be answered, that the parties who were the principal persons in the drama, may be brought understandingly to inquire in what relation they stand to each other. What we have said is decisive of the case, and we have only to add, that the judgment of the circuit court is affirmed.

WHAT ACTS OF CONSPIRACY ARE INDICTABLE: For a full discussion, see the opinion of Buchanan, J., in *State v. Buchanan*, 9 Am. Dec. 540; also *Commonwealth v. Judd*, 3 Id. 54; *Commonwealth v. McKisson*, 11 Id. 630; *State v. Younger*, 17 Id. 531; *People v. Mather*, 21 Id. 121; *State v. De Witt*, 27 Id. 371. To control wages, see *People v. Fisher*, 28 Id. 501, and note 507-512; *Commonwealth v. Hunt*, 38 Id. 346.

RAPE AT COMMON LAW must have been committed with force; consent, though gained by fraud, deprives the offense of the essential element of rape: *Lewis v. State*, 30 Ala. 56; *Rex v. Jackson*, 1 Russ. & Ry. C. C. 486; *Regina v. Clarke*, 6 Cox's C. C. 412; Leading Crim. Cas. 232; 29 Eng. L. and Eq. 542; *Wyatt v. State*, 2 Swan, 364. But there are cases in this country, and they seem to stand upon much the better reasons, that consent gained by fraud is equivalent to no consent, and does not deprive the offense of the character of rape: See *People v. Metcalf*, 1 Whart. C. C. 378, and note 381; *State v. Shepard*, 7 Conn. 54; *Crosswell v. The People*, 13 Mich. 427. The principal case is cited in the last case, with English authorities, that by the common law, where consent is obtained by fraud the crime of rape is not committed, but the court declared the better, and American doctrine to be, that consent gained by fraud would not prevent the offense from being rape. Judge Cooley, in delivering the opinion and commenting upon cases where the

woman's consent had been gained by fraud, says: "The outrage upon the woman, and the injury to society, is just as great in these cases as if actual force had been employed; and we have been unable to satisfy ourselves that the act can be said to be any less against the will of the woman, when her consent is obtained by fraud, than when it is extorted by threats or force."

CLARK v. BOGGS.

[6 ALABAMA, 809.]

JUSTICE OF THE PEACE IS LIABLE TO GARNISHMENT PROCESS for money collected by him, and service of such process upon him affords a sufficient excuse for not paying over such money to the person for whom collected.

MOTION made under the statute by Boggs against Clark, for failure to pay over money collected by him as justice of the peace. The refusal was on account of Clark having been garnished to pay it to another person. The plaintiff claimed that Clark was liable for the money collected, with ten per cent. per month damages. The circuit court gave judgment for the money, but refused to allow the penalty on the ground that the garnishment was a reasonable excuse for the refusal to pay it over. The only error assigned is the refusal to allow the damages.

Calhoun, for the plaintiff in error.

Sayre, contra.

By Court, GOLDTHWAITE, J. A justice of the peace is not merely a judicial officer with relation to the collection of small debts, etc.; but is also the agent of the person who intrusts their collection with him. As soon as the money is collected, his character as a magistrate ceases, and he holds it as any other agent. The sheriff is the officer of the court, whose process he executes, and public policy forbids that he should be drawn into any litigation with respect to the money collected on it before any other tribunal; and therefore, there is little analogy between his responsibilities and those of a justice of the peace. As a justice of the peace is nothing more than an agent, with relation to him whose money has been collected, he is within the scope of the statutes permitting garnishee process, and is required to answer as any other person; being liable to that process, it results that it affords a sufficient excuse for the omission to pay over money collected by him. In the present case, it is not expressly stated in the record, that he was discharged by the court, before which he was summoned, but we infer such was the fact,

from the circumstance that judgment was rendered against him for the sum collected.

Our conclusion is, that there is no error in the point excepted to, and the judgment is affirmed.

ATTACHING MONEY IN HANDS OF OFFICER: See *King v. Moore, ante*, 44, and cases collected in note.

STOVER v. HERRINGTON ET AL.

[7 ALABAMA, 142.]

MORTGAGE WHICH DOES NOT EXPRESS THE TRUE CONSIDERATION (which fact only appears by testimony *aliunde*), is not conclusively fraudulent, but the existence of fraud must depend upon the intention of the parties, as shown from the proofs, or inferred from established facts.

MORTGAGEE, BY PURCHASING TWO SLAVES INCLUDED IN HIS MORTGAGE, DOES NOT IMPAIR his lien as to the others. The intent thereby to defraud other creditors of the mortgagor can not be inferred, but only that he thought the security sufficient for his indemnity without these slaves.

MORTGAGEE IS NOT ESTOPPED FROM SHOWING THAT HE NEVER INTENDED TO ABANDON THE MORTGAGE by obtaining a judgment and execution for the debt intended to be secured, and causing the mortgaged property to be levied on and sold, and becoming himself the purchaser, under the false impression that such sale drew with it the lien of the mortgage, and was superior to liens attaching after the execution of the mortgage, and before the levy of the execution.

DEBTOR IN FAILING CIRCUMSTANCES MAY PREFER ONE CREDITOR, and transfer to him all his property, where there are no paramount liens, and the debt thereby intended to be secured is not disproportioned to the property received.

EQUITY WILL GRANT RELIEF BY AVOIDING A SALE AND ALLOWING A MORTGAGEE TO PROCEED under the mortgage, where he has obtained judgment and levied upon and purchased in the mortgaged property, under the false impression that the levy of the execution would draw to it the lien of the mortgage, and be superior to all liens attaching since the execution of the mortgage, especially upon his stipulating that the property shall sell for as much as it did under the execution sale at which he purchased.

BILL in equity by Stover against Herrington, Bonner, and Burns, praying that a sale of two slaves, Jane and Judy, by the sheriff to complainant, together with the stock and lands, be confirmed, or that the same be resold under his mortgage, and that defendant Burns be enjoined from proceeding with his suit at law against complainant. The facts are briefly these: Herrington mortgaged to Stover his land, stock, and sundry slaves, for the purpose of securing three promissory notes bearing even date therewith, payable in one, two, and three years respectively.

The notes and mortgage were executed before witnesses, and with the express understanding that the mortgage was given to indemnify the complainant for all liabilities he was under for the mortgagor; and the aggregate amount of the notes, it was agreed, should be twenty thousand dollars, as the exact amount of the complainant's liabilities for said mortgagor could not be then ascertained. Complainant, among other liabilities, was security on two promissory notes, payable to one Snipes, for three thousand three hundred dollars each, which he has since been obliged to pay. Two years after the execution of the mortgage, Herrington removed from the United States, taking all the slaves embraced by the mortgage except two, Jane and Judy. These slaves, together with the land embraced by the mortgage, were sold under an execution issued on a judgment against Herrington and complainant upon the last note payable to Snipes, and purchased by complainant, and the amount therefor, eleven hundred and twenty-three dollars, credited upon the execution. Jane had been sold to defendant Burns by Herrington just before his removal from the state, and he now has an action pending against complainant to recover her or her value. After the above judgment was obtained, the defendant Bonner sued out an attachment and levied on the land, and, long after the sale under the execution, obtained a judgment, and levied upon the land and sold it, becoming the purchaser himself for fifty dollars. Complainant, at the time of this sale, caused public notice to be given of his claim. Herrington was served by publication, and failing to answer, the bill was taken as confessed by him; Bonner and Burns filed answers, which, admitting the mortgage, insist that it was without consideration and voluntary, intended to hinder and delay the creditors of the mortgagor; also insisting that complainant never relied on the mortgage, but pointed out the slaves and the land to be sold under the execution, and that he can not now set up the mortgage as a lien on this property. The judgment on the second note to Snipes was rendered against Herrington alone before his removal, and an execution levied upon sufficient property to satisfy it. But a writ of error was sued out, with complainant as sole security on the bond. He only signed the bond, because on that condition H. agreed to sell him two slaves for one thousand six hundred dollars, in part payment of a debt of two thousand dollars which he owed him. The proof established these facts, and that the complainant's integrity was above suspicion. The chancellor refused to admit the proofs tending to

add to, alter, or qualify the consideration expressed on the face of the instrument, and that relating to the complainant's character. He held the mortgage to be fraudulent, and dismissed the bill.

Bethea, for the plaintiff in error.

Sellers, for the defendant Bonner.

Dear, for the defendant Burns.

By Court, COLLIER, C. J. In *Shirras et al. v. Caig & Mitchell*, 7 Cranch, 34, a suit was brought for the foreclosure of a mortgage, and it was objected to the validity of the deed that it did not truly state the mortgagor's indebtedness, but greatly exaggerated it. The court said: "It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of thirty thousand pounds sterling, due to all the mortgagees. It was really intended to secure different sums, due at the time to particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount. It is not to be denied that a deed which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is certainly always advisable fairly and plainly to state the truth. But if upon investigation the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrepresentation:" *Doe ex dem. Duval's Heirs v. McLoskey*, 1 Ala. (N. S.) 736, 737. So in *Prince v. Shepard*, 9 Pick. 176, the debt described in a conveyance for the creditor's benefit exceeded the amount really due, yet it was held that this might be explained so as to rebut the presumption of fraud. The statement of the consideration in the mortgage at a sum much greater than what was really due, is at most only presumptive evidence of fraud: *Parker v. Barker*, 2 Metc. 423.

Although no consideration be mentioned in a deed, yet it is not for that cause void; for every deed imports a consideration, and it devolves on the party who alleges the reverse to offer proof of the want of it: *Boynton v. Rees*, 8 Pick. 329 [19 Am. Dec. 326]; *Clapp v. Tirrell*, 20 Id. 250. So it has been held that a conveyance originally void as against creditors in consequence of fraud, may acquire validity, if the fraudulent intent

be abandoned, and the confirmation of the conveyance made for adequate consideration: *Oriental Bank v. Haskins*, 3 Metc. 332 [37 Am. Dec. 140]. And a mortgage or other transfer of property executed with intent to defraud creditors can not be avoided by them, unless the grantee participated in the fraudulent intent: *Jones v. Norris*, 2 Ala. 526; *Harrison v. Phillips Academy*, 12 Mass. 456; *Foster v. Hall*, 12 Pick. 89 [22 Am. Dec. 400]; *Bridge v. Eggleston*, 14 Mass. 250 [7 Am. Dec. 209]; *Johnson v. Johnson*, 3 Metc. 63. Nor can a fraudulent grantee be treated as a trustee of the grantor, if he has paid *bona fide*, debts of the grantor to the full amount of the property received: *Thomas v. Goodwin*, 12 Mass. 140; and if he has paid a less amount, he shall be entitled to a deduction *pro tanto* if there are no paramount liens: *Parker v. Barker*, 3 Metc. 423. See, also, *Barnett v. Stanton & Pollard*, 2 Ala. 195; *Cummings & Cooper v. McCullough*, 5 Id. 324.

Sometimes the question of fraud *vel non* is determined upon an inspection of the deed without the aid of extrinsic proof: *Ashurst v. Martin*, 9 Port. 566; *Gazzam v. Poynts*, 4 Ala. 372 [37 Am. Dec. 745]. But in the present case it is not insisted that the mortgage itself discovers a legal objection, but that it is defective, because it does not truly state the consideration; and this fact is brought to the view of the court by testimony *aliunde*. In this aspect of the case the existence of fraud must depend upon the intention of the parties as shown by the proof, or inferred from established facts: See the cases last cited, also *Wadsworth v. Marsh*, 9 Conn. 481; *Jackson v. Mather*, 7 Cow. 304. If the view taken of the law be correct, there can be no question that the depositions explanatory of the circumstances under which the mortgage was executed, and for the purpose of showing the extent of the mortgagor's indebtedness, are clearly admissible. And it is equally clear that they do not show the complainant to be guilty of a fraud in obtaining the mortgage. The statement of an exaggerated consideration, in the language of some of the cases cited, is at most *prima facie* evidence of fraud, and may be repelled by showing the fairness of intention on the part of the mortgagee. This has been done by the testimony in the cause, which very satisfactorily shows that the complainant did not intend to deceive any one, and that the consideration was misstated, because the amount for which he was the surety of Herrington was unknown to them at the time the mortgage was executed; and perhaps it was the only form in which the security could be obtained; the mortgagor

may, and most probable did, intend to defraud his creditors, but this we have seen can not prejudice the complainant, who did not concur in such a purpose. That there was a consideration for the mortgage, as well as the amount of it, is well established by the proof. The complainant claimed nothing more than was really due, and thus far we have seen his lien may be sustained.

The purchase by the complainant of two of the slaves embraced by the mortgage, can not impair his lien as to the others. It can not be inferred that he intended thereby to assist in defrauding the creditors of Herrington. The presumption from the proof is, that he esteemed the security sufficient for his indemnity without these slaves, or if not, that he considered it most beneficial to himself to purchase them in extinguishment of another debt that was due him from the mortgagor. Nor is fraud a legal conclusion from the fact, that the complainant became Herrington's surety in a bond for a writ of error, sued out to revise a judgment upon one of the notes against which it was the object of the mortgage to indemnify him. Perhaps it may have been supposed that the judgment would be avoided *in toto*, the complainant absolved from liability to pay the note, and his lien of course discharged. Be this as it may, it would seem from the proof that he did not act from a sinister motive, but was forced to execute the bond in order to obtain the two slaves.

The complainant was certainly mistaken, in supposing that he could enforce the lien of his mortgage, by causing an execution to be levied on the mortgaged property, while there were older executions in the sheriff's hands against the mortgagor's estate. But this can not operate as an estoppel, so as to preclude him from showing that he never intended to abandon the mortgage. The proof, instead of showing that he contemplated such a purpose, warrants the inference, that he supposed the execution when enforced for his benefit, acquired potency from the mortgage. This accounts for the solicitude felt and efforts made by the complainant, to cause the lands to sell for a fair market value at the sheriff's sale. He was doubtless of opinion that his interest as a mortgagee would prevent competition, and the advertisement put up in different places, was intended to encourage bidders by quieting their apprehensions as to the title.

We have seen that the evidence instead of connecting the complainant with the fraud (if any) which was purposed by Herrington, entirely exculpates him. The fact that the latter was embarrassed and conveyed his entire estate, considering, that

the only object of the complainant was to indemnify himself against the consequences of his suretyship, can not in any manner affect the validity of the mortgage. A party though indebted beyond his means of payment may prefer one creditor to all others, and transfer to him or for his security, all his property, where there are no paramount liens upon it. There may perhaps be cases, where the disproportion between the liability intended to be secured and the property conveyed is so great as to authorize the presumption of fraud; but the present is not a case of that character. It is clear that the mortgage imparted no aid to the execution under which the complainant purchased, and consequently he acquired no title as against the judgment and older *fiery facias* under which Bonner claims. The purchase by Burns of the slave Jane was good against an execution, the lien of which was not previously operative. This being the case, the complainant is remediless unless chancery can interpose, and administer relief. From the cause, as presented to us, there is nothing attributable to him incompatible with honesty of intention, nor is any sufficient reason shown, why the sales to Bonner and Burns should not be avoided, and the purchases by the complainant declared to be null; especially upon his stipulating that the property should sell for as much as it did under the execution sale at which he purchased. This being done, no objection is perceived in the present posture of the case to a foreclosure of the mortgage, and a decree for the sale of the property embraced by it.

That the cause may be proceeded in according to the principles of equity and the rules of procedure therein, the decree of the court of chancery is reversed, and the cause remanded, at the cost of the defendants in error.

ERRONEOUS AMOUNT STATED IN A MORTGAGE without fraud does not vitiate such mortgage: See *Gordon v. Preston*, 26 Am. Dec. 75, and the cases in this series collected in the note, 79. For Connecticut doctrine, see note to *Sanford v. Wheeler*, 33 Id. 392; and *North v. Belden*, 35 Id. 86.

DEBTOR MAY LAWFULLY PREFER ONE CREDITOR TO ANOTHER: *Wilkes v. Ferris*, 4 Am. Dec. 384; *Mackie v. Cairns*, 15 Id. 477; *Buffum v. Green*, 20 Id. 562; *Sommerville v. Horton*, 26 Id. 242. For full discussion of this right and its limitations, see note to *Crawford v. Taylor*, 26 Id. 584. See, also, *Nixon v. Douglas*, 30 Id. 368; *Skipwith v. Cunningham*, 31 Id. 642; *Anderson v. Fuller*, 36 Id. 290.

THE PRINCIPAL CASE IS CITED to the effect, that though a mortgagor may intend, by the execution of a mortgage, to hinder, delay, and defraud his creditors, yet if the mortgagee have no knowledge of the intent, the mortgage is valid and will be sustained, in *Anderson v. Hooks*, 9 Ala. 704, and *Abercrombie v. Bradford*, 16 Id. 560. A mortgagee may release a part of

the mortgaged estate, from the operation of the mortgage, without impairing his right to look to the residue: *Heirs of Holman v. Bank of Norfolk*, 12 Id. 371. A mortgage, founded on a valuable and adequate consideration, will not be declared void for fraud, when assailed by a subsequent purchaser at execution sale against the mortgagor, on proof of the mortgagor's embarrassed condition, and relationship to the mortgagee: *Troy v. Smith*, 33 Id. 469.

CRAWFORD v. CLUTE ET AL.

[7 ALABAMA, 157.]

GARNISHEE MAY PLEAD IN ABATEMENT A PENDING ATTACHMENT of the debt upon which he is sued.

PENDING OF AN ATTACHMENT DOES NOT BAR THE PROSECUTION of a suit by the original creditor against the garnishee, but merely suspends his right of action until the attachment is determined.

GARNISHEE, PLEADING IN ABATEMENT A GARNISHMENT PENDING FOR SAME DEBT, must set forth in his plea the proceedings at large, that it may be seen that the right to attach the debt existed, and that the law has been strictly pursued.

PLEA IN ABATEMENT OF A GARNISHMENT PENDING FOR THE SAME DEBT IS BAD, that does not aver that the court from which it is issued has jurisdiction, or that fails to allege that the affidavit required by law upon suing out garnishment process was made, or to aver that the entire debt was attached, if not, a portion thereof, stating it.

ASSUMPSIT by Clute and Mead against Crawford, as indorsees of a promissory note made by him, payable to D. Jones. The defendant pleaded a writ of garnishment, issued from the circuit court of the United States, commanding him to appear at the next term, and answer as to his indebtedness to D. Jones; and that he appeared, and the debt due upon the said note was then and there placed in the custody of the law, and that the said garnishment and attachment are still pending in the said circuit court, etc. The plaintiffs demurred to this plea, which demurrer was sustained. The defendant then pleaded the general issue, and judgment was recovered against him. He assigns as error the judgment sustaining the demurrer.

Plaintiff in person filed written argument.

Lessee, for the defendants in error.

By Court, ORMOND, J. We think it perfectly clear, both upon principle and authority, that the matter of this plea is good in abatement. The attaching creditor by the service of the garnishment has acquired a lien on the debt in the hands of the defendant, and we must presume that the circuit court of the United States having acquired jurisdiction over the subject, will

enforce the prior right, which the plaintiff in the attachment has acquired by the levy of the garnishment, even if this court should disregard it. As it is not certain that the plaintiff in attachment will be able to enforce his lien, the pendency of the attachment does not bar the prosecution of a suit by the original creditor against the garnishee, but merely suspends his right of action until the attachment is determined. In *Embree v. Collins* and *Collins v. Hanna*, 5 Johns. 101, the defendant to an action by the original creditor in New York, pleaded in abatement an attachment pending for the same debt in Maryland, and the court held the plea good. The same doctrine was affirmed in *Bourne v. Joy*, 9 Id. 221, and in *Brook v. Smith*, 1 Salk. 280. See also Com. Dig., Attachment, H, 719.

The case of *Cook v. Field*, 3 Ala. 53, is relied on by the plaintiff's counsel as decisive of this case against the plea. The point there decided is that an unsatisfied judgment against a garnishee can not be pleaded in bar of a suit afterwards brought by the original creditor, and the argument is, that if a judgment will not operate as a bar *a fortiori*, a suit which is only proceeding to judgment, will not suspend the creditor's right to proceed for the recovery of his debt. The principle of that decision is, that an unsatisfied judgment against the garnishee is no bar because it may never be enforced—the attaching creditor having the right under our attachment law to enforce the collection of his debt either against the garnishee or the original debtor; the unexecuted judgment therefore is no bar. But the garnishee before judgment obtained against him has not the right to discharge himself, by paying the debt on which he is garnished; and as the garnishment is a lien upon the debt he owes the original creditor, which when reduced to judgment will be conclusive against him, if he can not be protected by pleading the suit pending, he will have to pay the debt twice, without any fault of his, a result which could not be tolerated.

Although it is a clear right in the garnishee to plead in bar an executed judgment against him, or in abatement, a garnishment pending for the same debt, when sued by the original creditor, great strictness has always been required in the plea, and for most obvious reasons. The rights of the creditor ought not to be impaired, unless it is clearly shown that his debtor, the garnishee, has been legally compelled to pay the debt to another. For these reasons, it is held to be necessary that the plea should show the proceedings at large, that it may be seen that the right to attach the debt existed, and that the custom, or

attachment law, has been strictly pursued: See the authorities to this effect collected in 1 Com. Dig., Attachments, I, 727. In *Morris v. Ludlam*, 2 H. Bl. 362, it was held, that it was necessary to aver in the plea, that the defendant in attachment was indebted to the plaintiff within the city of London, as this was necessary under the custom of the city to authorize the attachment. Indeed, such are the difficulties attending the plea, that it is considered imprudent to plead the matter specially in bar, when it may be given in evidence under the general issue, as is the case when the action is *assumpsit*. See the note to *Turbill's Case*, 1 Saund. 67.

The plea in this case is bad, because it does not show that the circuit court of the United States had jurisdiction to issue the garnishment. Waiving all consideration of the question, that it is not averred in the plea that the circuit court had jurisdiction to render a judgment against David Jones, the assignor of the plaintiffs, and also whether the courts of the United States can issue process of garnishment upon their judgments—to give the court jurisdiction, it should have been averred in the plea, that the affidavit was made, which is the authority for issuing the process under the statute of this state: Clay's Dig. 259, secs. 1, 2. A judgment creditor has not the right as a consequence of his judgment to sue out garnishee process, but to entitle him to it, must make the affidavit which the statute requires. The necessity for this averment, is more apparent, when we consider that the process is not issued by a judicial officer, but *ex parte* by the clerk of the court, on the application of the plaintiff, and if any intendment in favor of the regularity of the proceedings could be indulged in, which we have seen is not allowed in such a plea as this, it could not be made in favor of a mere ministerial act such as this is. It was therefore necessary that the plea should have contained an averment that the proper affidavit was made, without which the court had no jurisdiction.

Again it should have been averred in the plea, that the entire debt was attached, if such was the fact, and if not, what portion thereof. This could only appear in such a case as this by the record of the judgment, on which the attachment issued, or at least by the averment of the amount recovered. The writ of garnishment merely requires the garnishee to appear and answer what he is indebted to the defendant in attachment; it affords no information whatever as to the amount claimed from the defendant in attachment. The averment therefore in the plea, that the debt was attached by the service of a garnishment,

does not show that the entire debt was attached, it may be but a small portion thereof. There may be other objections to the plea, but these are sufficient to show that the plea is bad, and that the demurrer to it was correctly sustained. Notwithstanding, it is certain that an attachment pending, may be pleaded in abatement, against a suit by the creditor, for the same debt. We think the garnishee has the right, and it would be the most convenient practice, to apply to the court in which such suit is pending for a stay of proceedings, until the attachment suit is determined; which it would be the duty of the court to allow, upon being certified of the fact of the pending attachment for the same debt. And, notwithstanding, an omission to plead the fact in abatement, or an ineffectual attempt to do so, it would still be the duty of the court upon the application of the garnishee, to stay the issuance of execution until the attachment is determined, upon a satisfactory indemnity being executed by the garnishee. See the case of *Fitzgerald v. Caldwell's Executors*, 4 Dall. 251, where that course was pursued in a similar case.

Let the judgment be affirmed.

PENDENCY OF AN ATTACHMENT of the debt sued upon, may be pleaded in abatement: *Scott v. Coleman*, 15 Am. Dec. 71. Judgment against a garnishee is not a defense when sued by his original creditor, unless the judgment has been satisfied: *Cook v. Field*, 36 Id. 437. A foreign attachment levied on a debt due the defendant in the plaintiff's own hands, is not a defense to a subsequent action by the defendant therein to recover the attached debt, without proof, other than the judgment in the attachment suit, of the existence of the debt on which the attachment issues: *Moyer v. Lobengeir*, 23 Id. 723. The principal case is cited and approved in *Crawford v. Slade*, 9 Ala. 887, to the effect that a plea of a pending attachment for the same debt, is bad, that does not show that the garnishment was properly sued out, by alleging those facts that authorize the clerk of the court to issue the process.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

ENGLISH v. BRENNEMAN.

[5 ARKANSAS, 377.]

ALTERATION IN MATERIAL PART OF AN INSTRUMENT avoids it.

DATE IS NOT NECESSARY TO VALIDITY OF NOTE. The date, none being named, is computed from the delivery or issuing of the note.

ALTERATION CAN BE EFFECTED BY INSERTION OF DATE where it has been omitted, as well as by the changing of a date already affixed.

WHERE DATE OF INSTRUMENT IS IMATERIAL, its insertion after delivery, by the holder, does not vitiate it.

WHERE A NOTE IS COMPLETE WHEN DELIVERED to the holder, he can not alter it without an authority in fact from the drawer.

HOLDER FILLING IN BLANK FOR DATE in a note, after its delivery to him, by which the time of payment is accelerated, without the consent of the maker, renders the note void.

BURDEN OF PROOF IS ON PARTY ALTERING NOTE to show that it was done by authority of the maker.

ASSUMPSIT on a promissory note drawn by the defendant and others in favor of Brungard. It was signed by the makers, with a blank left for the date, and delivered in that condition to Brungard. The note in suit bore a date almost a month before the time of its delivery. The plaintiff moved the court to instruct the jury that a party who signs a note in blank and delivers it, thereby authorizes the holder to fill in the blank; that it was upon the defendants to prove that it was altered contrary to agreement; that a deed or bond could not be delivered to the obligee as an escrow, and likened the note in this case to a bond. The defendants moved the court to instruct that the plaintiff must prove the execution of the identical instrument, or show that it was altered by the authority and consent of the defend-

ants, and that otherwise the note would be void. The court refused to give the defendants' instructions, but gave those asked for by the plaintiff. Defendants excepted. Verdict for plaintiff; defendants brought a writ of error.

Cummins, Trapnall, and Cocks, for plaintiffs.

Ashley and Watkins, *contra*.

By Court, SEBASTIAN, J. The only question raised by the bill of exceptions is, whether the filling up of the blank for the date was such an alteration as avoided the note. The evidence fully establishes the fact, that the blank for the date was unfilled when finally delivered to Brungard, and that the date was afterwards inserted either by him, or by Breneman, as, in the absence of evidence to the contrary, the legal presumption is, that it was inserted by one who had the legal custody of the note. According to the view which we entertain, it is immaterial whether the alteration were by them, or by any other person, as it would not then be the same obligation, and this is the question raised by the pleadings: *Master v. Müller*, 4 T. R. 320. It is quite immaterial whether the alteration is affected by the changing, erasing, or inserting a date, the legal consequences are the same. The principle extracted from all the cases is, that any alteration in a material part of any instrument or agreement, avoids it because it thereby ceases to be the same instrument. It is a rule, founded in good sense and policy, and protects the integrity of such instruments from violation by refusing to alter them. Every sanction to their safety and uninterrupted circulation, free from alteration, should be afforded. If the note, when signed and finally delivered by the payors to the payee, was perfect and of legal obligation, an alteration could be effected as well by the insertion of a date, where it had been omitted, as by the changing of a date, already affixed, because, then the obligation of the parties is altered. The date was not necessary to the validity of the note, and in that shape, after delivery, it was the legal and definite obligation, and afforded a legal right of action to the payee: *Chit. on Bills*, 168; *Armist v. Breame*, 2 Ld. Raym. 1076; *Giles v. Bourne*, 6 Mau. & Sel. 73; 2 Chit. 300; *Lansing v. Gaine*, 2 Johns. 300 [3 Am. Dec. 422], and numerous cases which establish the principle mentioned, and that the date in such cases, is computed from the delivery or issuing.

It is advisable in most cases to insert a date, as it has been considered that the date is *prima facie* evidence of its having

been made on the day of the date: *Taylor v. Kinloch*, 1 Stark. 175; but the question which we are considering is not whether the note in that shape was imperfect in form, but whether it was perfect in obligation. The note was due two years after date, which, according to the cases above, was to be computed from the day of its delivery, which was about the last of March, or first of April. The date inserted was the fourth day of March, by which the day of payment was accelerated nearly one month. The legal operation, therefore, of the note, when delivered, was not the same which it imported after its alteration. This was the very principle of the case of *Master v. Miller*, 4 T. R. 320, in which the date of an acceptance had been altered from the twenty-sixth to the twentieth day of March, by which the day of payment had been accelerated, and the note held to be avoided. And the law is the same, where the alteration is by the payee, without the consent of the payor, by which the time of payment is retarded: *Bank of the United States v. Russel & Boone*, 3 Yeates, 391. Any alteration in a material point, whether for the benefit of the payor or not, without his consent, vitiates the instrument; and the date, though not material to give legal vitality to the note, was made material in this case, as fixing the time of payment. If the date had been immaterial, as where its office is only to fix the time of execution, and does not have any reference to the time of performance, its insertion would be of no consequence, or, if inserted only to supply or declare the real intention of the parties, it would not vitiate the note: *Attwood v. Griffin*, Ry. & M. 425; or if the date had been inserted in accordance with the actual time of execution and delivery, it would not have avoided the obligation, for in such case it is still the same obligation. The application of these principles to the case was not, however, warranted by the facts before the jury, which showed no mistake to be corrected, and expressly disproved the truth of the date as evidence of the time of execution.

According to the principle before referred to, the circuit court was not warranted in charging the jury "that the filling up of a blank date in a promissory note by the holder, to whom it is delivered, is not an alteration or erasure of it." There is a class of cases where the filling of blanks is no avoidance of the note, and which will bind the other parties on the ground of a presumed or actual consent to such alteration. When a person indorses a note with blanks for date, sum, etc., and intrusts it to the maker, he thereby gives him a letter of credit for an indefi-

nite sum, and constitutes him, by implication of law, his agent in the filling up of the blanks: *Russel v. Langstaffe*, 2 Doug. 516; *Violett v. Patton*, 5 Cranch, 142; S. C., 2 Pet. Cond. Rep. 214; *Bank of the Commonwealth v. McChord & Payne*, 4 Dana, 191 [29 Am. Dec. 398]; and the law is the same where one of several co-obligors in a note, signs it in blank and delivers it to the other payee. He thereby gives him a general authority to fill it up at his discretion: 4 Dana, 191.

The reason upon which these cases proceed is, that while the note is incomplete and *in fieri*, it is not the obligation of the parties, and that any alteration effected by the persons to whom it is intrusted, is presumed to be by the consent of the others. This distinction pervades all the cases of implied authority. But as soon as the instrument is complete by passing into the hands of another person, and becomes an available security, such implied authority ceases, and an authority, in fact, is necessary; because any alteration then made without the consent of the other parties, either changes their contract, or creates an obligation where none subsisted before, and such was the ground upon which the case of *Crutchly v. Mann*, 5 Taunt. 529, was decided. In that and many other cases cited at the bar, where parties have been held bound, alterations after the negotiation of the note, they were so declared, not because it was the case of a blank, but because there was an express authority to fill it. When, therefore, the note in this case was in the hands of any one of the co-obligors before delivery, it would have been competent for any one of them, to whom it was intrusted, to have filled up the blank, because this was not inconsistent with the general authority resulting by law, and the whole matter might be said to be still *in fieri*; but as soon as it was delivered to the payee, it was beyond their control, and Brungard having accepted it in that condition, as perfect, was not at liberty, without the assent of the payors, to insert a date different from the true date. It therefore devolved upon the plaintiff to prove his authority to insert the date of fourth of March, which he failed to do. Upon general *non est factum* the proof lies upon the plaintiff: *Pope v. Latham*, 1 Ark. 66. We therefore think, that the court erred in overruling all of the instructions, which the defendants asked, and erred also, in giving all the instructions asked by the plaintiff, except so far as he charged the plaintiff, that a deed can not be delivered to the obligee as an escrow. The circuit court should have told the jury that, in such case, no authority was implied by law, but that it requires express author-

ity to fill up the date, which might be proved by direct testimony, or inferred from circumstances.

Inasmuch as the instructions of the court probably influenced the jury materially, in their finding, we must reverse the judgment, and remand the case for a new trial, with instructions to be proceeded in, according to law, and not inconsistent with this opinion.

ALTERATION OF INSTRUMENTS, EFFECT OF: See note to *Blackwell v. Lane*, 32 Am. Dec. 675; *Davis v. Fuller*, 36 Id. 334; *Eddy v. Bond*, Id. 767; *Humphreys v. Guillow*, 38 Id. 499. The notes to these cases refer to other decisions in this series.

HYNSON v. DUNN.

[5 ARKANSAS, 395.]

GENERAL PLEA OF FRAUD IS BAD. The party whose conduct is sought to be impeached, has a right to be apprised of the facts which constitute the alleged fraud.

PURCHASER TO RESCIND CONTRACT OF SALE must put the vendor, or offer to put him, in the same situation he was in before the delivery of the property.

PLEA SETTING UP DEFENSE OF FRAUD in a sale, as a defense to an action for the purchase money, is bad, when it fails to allege a return of the property or an offer to return.

ACTION CAN NOT BE MAINTAINED FOR BREACH OF WARRANTY, whether express or implied, unless there has been a recovery by the real owner. It is necessary in such a case for the pleading to show that the vendee has been evicted or lawfully deprived of the use and possession of the property.

DEBT on two bonds given by the defendant, Hynson, to secure payment for a slave sold to the defendant by the plaintiff. The defendant filed three pleas: 1. That the bonds were obtained by fraud and misrepresentation, as the plaintiff had represented the slave to be a good mechanic, brick-mason, and brick-layer, when he was not. 2. A general plea that the bonds were obtained by fraud, and therefore void. 3. That plaintiff warranted the title to the slave, and that he had no title whatever; therefore the bonds were void. The plaintiff demurred, and assigned as reasons, that the first plea was no defense at law, but fell within the jurisdiction of equity; also, that it did not allege an offer to return the property; that the second plea was general, and therefore bad; that the third plea did not allege an eviction, or that any adverse claim had been set up. Demurrer sustained; final judgment for plaintiff. The defendants brought error.

Fowler, for the plaintiff.

William Byers, contra.

By Court, LACY, J. This is an action of debt, brought by the defendant in error against the plaintiffs on two writings obligatory. The defense set up is a general and special plea of fraud in the sale and delivery of a slave, and want of title in the vendor. The general plea of fraud is unquestionably bad. Our statute is express on the subject, for it declares that "the defendant, by special plea, may impeach or go into the consideration of a writing under seal in the same manner as if such writing had not been sealed;" R. S., c. 116, sec. 74; and upon principle, a general plea of fraud is not good. The party, whose conduct is sought to be impeached, has an unquestionable right to be apprised of the facts which constitute the fraud; otherwise he might be taken by surprise on the trial.

The other pleas are equally defective, as the case of *Sumner v. Gray*, 4 Ark. 471 [38 Am. Dec. 39], unquestionably proves. If a purchaser wishes to rescind a contract of sale, he must put the vendor, or offer to put him, in the same situation he was in before the delivery of the property. He will not be allowed to retain the property and protect himself against the payment of the purchase money. If he retain the property, he can not treat the contract as void for want of consideration upon the ground of fraud. The defense set up by the plea of fraud, fails to allege that the plaintiffs in error returned the property, or offered to return it. For this defect it was rightly adjudged insufficient. Again, it wholly fails to aver that the servant is of no value whatever. Where a vendee relies on the warranty of title, whether express or implied, there must be a recovery by the real owner, before an action can be maintained for a breach of contract. This is in the nature of an eviction, and it is necessary in such a case, for the pleading to show that the vendee had been evicted, or lawfully deprived of the use and possession of the property; and in omitting to do this, it discloses no breach of the warranty. It would be unjust to permit the vendee to retain possession and enjoy the benefit of the property, and put his vendor at defiance. The plea of want of title in the vendor is, therefore, no bar to the action, and the demurrer to it, as well as to the other pleas of fraud, was properly sustained.

Judgment affirmed.

RESCISSION OF CONTRACTS OR FRAUD: See *Kase v. John*, 36 Am. Dec. 148; *Camp v. Camp*, Id. 423; *Cullum v. Branch Bank*, 37 Id. 725; *Voorhees v. Earl*, 38 Id. 588, and notes, referring to other cases in this series.

EVICTON BY A PARAMOUNT TITLE MUST BE ALLEGED to charge a party for breach of a covenant of warranty, or for quiet enjoyment: *Logan v. Moulder*, 33 Am. Dec. 338. See also *Sumner v. Gray*, 38 Id. 39.

SNEED v. STATE.

[ARKANSAS, 431.]

LARCENY IS FELONY AT COMMON LAW.

NO INDICTMENT FOR FELONY SHALL BE TRIED, unless the defendant be personally present during the trial.

VERDICT CAN NOT BE RENDERED IN PRISONER'S ABSENCE; and such a verdict is void. This principle applies where the prisoner is out on bail, the law not regarding the cause of his absence, as whether he is away voluntarily or against his will.

INDICTMENT for larceny. On the trial, the defendant was on bail, and was not present part of the time while it was progressing, nor when the jury returned a verdict of guilty, and were discharged. No judgment was at the time rendered on the verdict. At the next term, the attorney general ordered the defendant into custody, and moved the court to render judgment on the verdict. The defendant moved that judgment be not rendered, as he was not present when the verdict was returned. Motion overruled, and judgment rendered. Defendant appealed.

Walker, for the appellant.

Watkins, attorney general, *contra*.

By Court, SEBASTIAN, J. The offense with which the prisoner stood charged, was larceny; and this is felony by the common law. In such cases, by our revised statutes, p. 307, sec. 154, no indictment for a felony shall be tried, unless the defendant be personally present, during the trial. This was only declaratory, and an affirmance of the common law, which would not allow any proceeding affecting life, or liberty, to be had in the absence of the prisoner, and when any step was to be taken in the cause, the prisoner was to be present personally, lest in so important a matter, he should be prejudiced. This care of the law for his safety, was extended through the whole trial, from his arraignment to his final conviction or acquittal. No verdict, therefore, could be properly rendered in court in the prisoner's absence,

because he was not there to make objection to or avail himself of them. The authorities are express upon this point: 1 Chit. Crim. L.; *State v. France*, 1 Overt. 434; *Nomaque v. People*, 1 Breese, 145 [12 Am. Dec. 157]; *People v. Perkins*, 1 Wend. 91. And where the defendant is out on bail, the principle is the same; the law not regarding the cause of his absence, as whether he is away voluntarily or against his will: *State v. Hurlbut*, 1 Root, 90. The verdict being taken in his absence, was void, consequently the court erred in entering judgment of conviction upon the finding, but should have ordered a new trial to be had.

Judgment reversed, and new trial awarded.

TRIAL IN ABSENCE OF ACCUSED, WHEN MAY BE HAD: This subject is discussed in the note to *Fight v. State*, 28 Am. Dec. 626; and see *Sperry v. Commonwealth*, 33 Id. 261; *State v. Hughes*, 36 Id. 411.

RIGGS v. MARTIN.

[5 ARKANSAS, 506.]

ACT REQUIRING CLAIMANT AGAINST DECEASED PERSON'S ESTATE TO MAKE OATH in open court that the claim is justly due, is unconstitutional.

IDEM.—The act of the legislature forbidding the affidavit of a claim to be received as evidence of the demand, and requiring that it be proved by other competent testimony, is unconstitutional.

Riggs filed for probate a claim against the estate of one Mc-White, with an affidavit made before a notary public in Maryland that the claim was justly due and unpaid. The fact that the claim was not allowed by Martin, the administrator, was indorsed on the note and affidavit. The probate court rejected the claim because no affidavit of the claim was made in open court, as required by section ninety-seven of the chapter on administration. The plaintiff contended that that section was unconstitutional, and appealed to the circuit court, and the claim being rejected there, plaintiff sued his writ of error.

Pike and Baldwin, for the plaintiff.

By Court, LACY, J. The only point of contest, or of the least difficulty in this cause, is the constitutionality of the ninety-seventh section of the act of the legislature regulating the proceedings of administration in the court of probate. That section declares, "that no demand shall be allowed by the court of probate, unless the claimant shall make oath in open court that he has given the estate credit for all payments and offsets

to which it is entitled, and that the balance claimed is justly due." The ninety-eighth section of the same statute forbids such affidavit to be received as evidence of the demand, and requires it to be proved by other competent testimony before it shall be allowed. We hold these sections to be clearly unconstitutional. The legislature certainly does not possess the power to cut off all remedy on demands against the estate of deceased persons, or so to impair the right or clog its assertion as to render it inoperative or valueless. To draw the line between the legislative and judicial departments of government, arising upon questions of the remedy and right of contract, is admitted by all jurists to be a most difficult and perplexing task, and no universal rule has ever yet been laid down and established on that subject. Most of the cases, if not all of them, have been decided on their own peculiar state of circumstances, and they have generally been carefully and satisfactorily determined. It is a maxim of universal justice, pervading the whole system of the common and civil law, that wherever a party has a legal right, he is entitled to a legal remedy to enforce it. For, if this was not the case, it could not be said that the laws reigned and governed the rights of contract. It is the obligations of the laws compelling men to perform their legal duties or punishing them for their violation that gives security and affords protection to life, liberty, and property; and the peaceful and unfettered enjoyment of these blessings marks the boundaries between just and arbitrary governments. It is obvious that in all cases of small sums against the estates of deceased persons, owing to our own citizens, who reside at any distance from the court of probate, or to those of other states, to require these claimants to appear in open court and make oath of the justness of their demands, would, in effect, bar them. The cost and trouble of traveling to court and returning, would consume, and in most instances, far exceed the original amount of their claims. In these cases, by cutting off all remedy from their assertion, the legislature has completely destroyed all these legal obligations, and in many cases there would be a physical inability for the claimant to attend and make oath in open court. Certainly physical inability, or bodily or mental infirmities, can not destroy the legal obligations of men's contracts; and even in cases of large amount, the party's rights to enforce them would often be so incumbered and burdened, as seriously to impair their value and efficiency.

Again, even after the party has made an affidavit, the legisla-

ture declares that it shall not be received as evidence for him in the cause, but compels the claimant to establish his demand by other satisfactory proof. The legislature places an onerous burden on the assertion of his rights, and oppresses him not only by requiring a useless, but expensive act to be done, and when it is performed, it allows it to have no weight or influence in his favor in the cause. In every aspect that this case presents itself, we are clearly of opinion that the section in question is unconstitutional and void, and as the circuit court excluded the claim from allowance on this ground, its judgment must be reversed.

BUCKNER v. REAL ESTATE BANK.

[5 ARKANSAS, 536.]

BILLS OF EXCHANGE ARE ASSIGNABLE BY CUSTOM OF MERCHANTS; our statute only confirms the negotiability of such instruments as it existed by the *lex mercatoria*.

TRANSFER OF BILLS PAYABLE TO ORDER is properly by indorsement; though in cases where an indorsement is necessary no particular form of words is required.

PLAINTIFF SUING UPON BILL OF EXCHANGE MUST SHOW TITLE in the same manner as every other plaintiff.

STATUTE USING WORD WHOSE MEANING IS WELL KNOWN, and has a definite sense at common law, the word shall be expounded according and restricted to that sense.

INDORSEMENT MUST BE MADE ON INSTRUMENT ASSIGNED, or on some paper accompanying it at the time the bill passes.

LEGAL INTEREST IN BILL IS NOT TRANSFERRED BY DEED OF ASSIGNMENT of all the debtor's property in trust for the benefit of his creditors, so as to entitle the trustees to sue in their own names.

ASSUMPSIT on a bill of exchange drawn by the defendants in favor of the bank. The defendant pleaded that after the last continuance, the bank had assigned, all its interest in the bill. The plaintiff replied that it had transferred the bill of exchange, together with all the rest of its property, by a deed of assignment in trust for the payment of its debts, and in no other way, and that the suit ought not to be barred. The defendants demurred to the replication, the demurrer was overruled, and judgment was entered against them. A writ of error was brought.

Ashley and Watkins, Trapnall and Cocke, for the plaintiffs.

Pike and Baldwin, contra.

By Court, **LAOY, J.** The question to be decided here, arises upon the demurrer to the plaintiff's replication, which is an an-

swer to the defendant's plea, *puis darrein continuance*. The replication avers that the bill of exchange upon which the suit is brought, was assigned and transferred upon the second of April, 1842, by deed of that date duly executed, whereby the Real Estate Bank of the State of Arkansas conveyed the same with all her estates, real and personal, choses in action, and assets, to certain trustees therein mentioned for the payment of all her debts and liabilities. This assignment is shown by the plea to have been made subsequent to the institution of the suit, and the inquiry now is: does the deed of assignment pass the legal estate in such manner as to divest the corporation of her right of action, and convey the same to the trustees?

It is by force of the custom of merchants that a bill of exchange is assignable. Our statute only confirms the negotiability of such instruments as it existed by the *lex mercatoria*. It changes no principle of the law merchant in regard to the manner of assignments, but expressly recognizes them. The jurisprudence which regulates bills of exchange is founded upon and embodies the usages of merchants in different commercial countries, and the general principle of natural law, as applied to their respective rights, duties, and obligations: Story on B. Exch. 25. A bill payable to a person or his order, is properly transferable by indorsement. "Properly," says Justice Story, "because in no other way will the transfer convey the legal title to the holder, so that he can at law hold the other parties liable to him *ex delictu*, whatever may be his remedy in equity." "If there be an assignment without indorsement, the holder will thereby acquire the rights only that he would acquire upon an assignment of a bill not negotiable:" Story on B. Exch., sec. 201. A plaintiff who sues upon a bill of exchange must show title in the same manner as every other plaintiff. The title of an original payee is immediate and apparent upon the face of the bill. He who takes by assignment, takes a derivative title which the common law does not acknowledge. He takes title by the *lex mercatoria*, and the custom in such cases directs that the manner of assignment should be made by a writing called an indorsement, purporting that the contents of the bill are to be paid to a third person. And in respect to bills drawn in favor of a person or bearer, the assignment is to be made by delivery. In such a case the bill is not negotiable or payable to order, but to the person or bearer; it is then transferable only by delivery. Either actual or constructive delivery is indispensable to constitute a legal title to such a bill.

In cases where an indorsement is necessary to pass the bill, no particular form of words is required. The word indorsement, in its strict sense, imports a writing upon the back of the bill, but it is now settled that this is not essentially necessary to pass the bill. On the contrary, it would be a good indorsement if it were made upon the face of the bill, or in another paper annexed thereto (which is called in France *allonge*), and which is sometimes necessary, where many successive indorsements are to be made: Chit. on Bills, c. 5, p. 147. In *Hopkirk v. Page*, 2 Brock. 41, Chief Justice Marshall held "that the legal interest in a bill of exchange, according to the law merchant, could not be transferred otherwise than by an indorsement, and the indorsement must be upon the bill, or at least, must accompany it; and that a general assignment by deed of all the debts of an individual can not be considered as a negotiation of a bill upon mercantile usage, so as to authorize the holder to sue in his own name." The doctrine here laid down conclusively shows that the deed of assignment we are here considering, does not transfer the legal interest in the bill to the trustees, in such manner as to authorize them to sue in their own names. In other words, that it is not a good indorsement or assignment: Chit. on Bills, c. 5, 178, 179; c. 6, 218, 219, 252; Kent's Com., 4th ed., p. 78; Story on Bills, 221; *Gibson & Johnson v. Minet & Fector*, 1 H. Bl. 569; *Waters v. Millar*, 1 Dall. 369; *Douglass v. Wilkeson*, 6 Wend. 639.

The authorities already cited, prove that by the law merchant, there is a positive and fixed meaning to the word "order" in a bill of exchange, and that it means, generally, an order indorsed on the bill, and can mean nothing else: and that the words "assignment" and "indorsement" are frequently used interchangeably by all the writers on the subject. By the first section of the chapter of assignment it is provided that "all bonds, bills, notes, agreements, and contracts in writing for the payment of money, or property, or for both money and property, shall be assignable." This makes many instruments negotiable which were not so by the common law. This act does not purport or intend to change the law merchant as to the instruments before assignable, but merely adds to their number by including a class of agreements which were not before negotiable. This undoubtedly would be the true meaning of the act, if it contained no other provisions bearing upon the subject, for in construing it, we would be bound to look to the former mischief, the proposed remedy, and the reasons for the change: *Heydon's Case*, 3 Co. 7. If a statute makes use of a word, the meaning

of which is well known, and has a definite sense at the common law, the word shall be expounded and restricted to that sense: *Smith v. Harmon*, 6 Mod. 143; *Dwarris on Stat.* 637, 640, 712; 2 Inst. 200; 1 Id. 211, 215. By reference to the fourth section it is perceived, that the assignee in bringing his suit on any instrument of writing made assignable, shall not be required to prove the assignment, unless the defendant annex to his plea an affidavit stating that he believes that the assignment on such instrument was forged. Section 5 speaks of assignments on such assigned paper, and section 7 speaks of blank assignments; section 9 uses the word "indorsers" and "assignors," but this must be understood in reference to the true meanings of assignment. The words "assignor" and "assignment" relate to bills and notes not negotiable, but payable to bearer; and the words "indorser" and "indorsement," to all other instruments made negotiable. By sections 7 and 8 of the chapter upon bills of exchange, no damages are given, except upon such as are payable to order or bearer; and the tenth section gives an action against the drawer, acceptor, and indorser. These several sections clearly show that the indorsement must be made upon the instrument assigned, or on some paper accompanying it at the time the bill passes.

In the present case the replication avers, that the bill of exchange, together with all the other property, real, as well as personal, and assets of the bank, was transferred by deed to certain trustees for the payment of the debts of the bank. This is an affirmative averment, and is wholly inconsistent with the idea that the assignment was made by indorsement upon the bill, or by any other instrument of writing attached to it. If the facts alleged be true, and the demurrer admits them to be so, it inevitably follows that the bill was not indorsed or assigned in the manner required by the law merchant and statute. It would have been impossible that such a deed as the one averred to be executed, could have been made upon the bill. The plea avers that the assignment was made after suit brought by the bank, and the replication equally contradicts the supposition that the deed of assignment accompanied the bill, or was attached to it. It may be said that the replication does not exclude the hypothesis that the bill might not have been assigned by some other instrument (other than the deed) accompanying it. We think otherwise. It avers affirmatively that it passed by the deed of assignment, and "in no other manner whatsoever." This allegation expressly negatives the intendment that

it might have been indorsed or assigned by some other instrument which was attached to the bill. The affirmative averment in this instance is equivalent to an express negative, and to us is conclusive upon the point. "Nothing," remarks Chief Justice Marshall, "can be more anti-commercial than the idea of transferring negotiable paper by a deed conveying a vast number of bills, bonds, notes, and accounts." Such an instrument may be very properly considered as conveying the equitable interest and the right to receive the money, but can not be regarded as the negotiation of a bill upon mercantile principles, so as to authorize the holder to sue in his own name. We, therefore, regard the replication as a sufficient answer to the plea, and consequently, the demurrer to it was properly overruled.

The judgment is therefore affirmed; and as this case was submitted before there was a seizure pronounced against the corporation of the Real Estate Bank of the State of Arkansas, the judgment here given is ordered to be entered as of the eighteenth day of July, of this term.

Ringo, C. J., dissented.

INDORSEMENT IS NECESSARY TO TRANSFER BILL or note payable to order, so as to enable the holder to sue thereon: *Lancaster v. Baltzell*, 28 Am. Dec. 233.

WHEN LEGISLATURE USES WELL-KNOWN WORDS IN STATUTE, it is to be supposed they were used in their ordinary sense: *Hillhouse v. Chester*, 3 Am. Dec. 285; *Butts v. Voorhees*, 22 Id. 489. And common law terms should receive the construction affixed to them by the common law: *Carpenter v. State*, 34 Id. 116. General words must receive a general construction: *Jones v. Jones*, 36 Id. 723.

INDORSEER'S INTEREST MUST APPEAR IN SUIT OR NOTE not negotiated in the usual manner: *Woodbridge v. Austin*, 4 Am. Dec. 740.

STATE v. REAL ESTATE BANK.

[5 ARKANSAS, 595.]

WRIT OF QUO WARRANTO IS THE PROPER PROCEEDING to ascertain whether a forfeiture of the charter of a corporation has been incurred.

FRANCHISES ARE PRIVILEGES CONFERRED BY GRANT from the government, and vested in private individuals.

ACTS GRANTING FRANCHISES ARE CONTRACTS, and ought to be construed by the well-established principles which regulate contracts.

CORPORATE CHARTER MAY BE FORFEITED if the trust upon which it is granted be broken and the corporation perverted.

GROUND OF FORFEITURE OF CORPORATE CHARTER once vested by a full performance of all preliminary conditions, are, first, a total neglect or non-

user of its duties; secondly, an abuse of them, improvidently, ignorantly, or fraudulently.

COURTS LEAN AGAINST FORFEITURE OF CORPORATIONS; their object is to preserve and uphold the estate, unless it be clear that the rights vesting in it have been improvidently neglected or illegally abused.

WHERE PENALTY FOR ANY OMISSION IS FIXED BY STATUTE creating the corporation, the penalty is the only punishment that can be inflicted, and the omission is no cause of forfeiture; the presumption is that the legislature intended the penalty as a satisfaction for the breach.

MERE SUSPENSION OF SPECIE PAYMENT BY A BANK can not create a forfeiture where the charter provides that, in such a case, the person having the right to demand payment shall be entitled to recover damages.

RECOGNITION OF BANK AS AN EXISTING CORPORATION, AFTER CAUSE OF FORFEITURE, by the state, estops the state from setting this up as a ground of forfeiture.

FORFEITURE BY CORPORATION IS WAIVED BY SUBSEQUENT LEGISLATIVE ACTS recognizing the legal existence of the corporation.

IDEM—STATE BORROWING MONEY FROM A BANK, after the suspension of specie payments, in virtue of an act of the legislature, is estopped from insisting upon the fact of suspension as a cause of forfeiture.

STATE CAN DISSOLVE CORPORATION BY JUDICIAL TRIAL AND JUDGMENT ONLY; and this is so though the act provides that in default of fulfilling the condition, the corporation should be dissolved; in all cases the forfeiture must be judicially ascertained and declared.

MERE NON-USER BY CORPORATION IS NOT A SURRENDER, and the court can not presume a surrender from non-user, or a failure to exercise its privileges, unless the charter contains some express provision to justify such inference.

CHARTER OF CORPORATION IS FORFEITED BY ASSIGNMENT of all its property to trustees.

QUO WARRANTO issued from this court to seize the franchises of the Real Estate Bank. The bank pleaded a complete organization under its charter, and alleged that it had regularly paid the bonuses as provided therein, and that an act passed December 28, 1840, authorized the governor to borrow money from the bank and execute the bonds of the state for the money borrowed, and that in pursuance of the statute money was borrowed and bonds executed, which still remained unpaid. There were seven replications: 1. That on November 2, 1839, the bank suspended specie payment, and the suspension still continued; 2. That on April 2, 1842, the bank became insolvent, and remained so; 3. That on April 2, 1842, the bank had assigned all its property to trustees; 4. That in September, 1840, the bank sold state bonds issued to it at less than par value; 5. That the bank hypothecated certain of the bonds, March 1, 1842, and that they are still unredeemed; 6. That the bank has failed to pay interest on the state bonds; 7. That the bank ceased to exercise its

franchises April 2, 1842, or perform its duties, and has abandoned the charter. There was a demurrer to each replication.

Pike and Baldwin, for demurrant, admitted that the third replication was good.

R. W. Johnson, and Watkins, attorney general, contra.

By Court, LACY, J. The first question to be determined is, is the ancient writ of *quo warranto* a proper remedy in this cause? That it is so we have no doubt. The constitution gives to this court the power to issue and determine it, and the legislature has made it the duty of the attorney general to institute this proceeding whenever he shall be satisfied that the bank has forfeited her charter. This ancient writ, which is a civil proceeding, upon the part of the government, has long since become obsolete in England, and it is now wholly suspended in that country and most of the states in this union, by an information in the nature of a *quo warranto*, which is in the nature of a criminal prosecution on behalf of the sovereign. The form and substance of the judgment, so far as respects the seizure of franchises is concerned, is the same in both cases, and which is, that of ouster or seizure of the franchise into the hands of the state. The pleadings are very similar; so that if the information in the nature of a *quo warranto* is the rightful remedy in England and most of the states to ascertain whether or not a forfeiture of a corporation has been incurred, it necessarily follows that under our system of jurisprudence, the original writ of *quo warranto* is the proper proceeding.

In 1688 the crown filed an information in the nature of a *quo warranto* to seize into its hands the franchises of the corporation of the city of London. In this memorable struggle between right and justice on the one hand, and tyranny and oppression on the other, the king finally obtained judgment, although the city well merited the striking remark applied to her by one of the most illustrious patriots that ever lived, which was that she resembled a fortress of liberty in a conquered country. This judgment was afterwards set aside by a solemn act of parliament; but the form of proceedings in such cases and the pleading have ever, says Justice Blackstone, been regarded as sufficiently regular: 1 Bl. Com. 484. The precedent then established was again re-affirmed more than a century afterwards in the case of *The King v. Amery*, 2 T. R. 515; and the same doctrine has recently been held in Lord Kenyon's cases. In *Thompson v. The People*, 23 Wend. 537, the authorities were critically

examined, and the principle before stated fully recognized, and declared to be unimpeachable. It is clear then that the state in the present instance has not mistaken her remedy, and it now becomes the duty of this court to pass upon the several grounds of forfeiture she has alleged.

It would be well here to inquire what are franchises, liberties, and privileges, which the state desires to have seized, and what acts are causes of forfeiture? Finch defines franchises "to be branches of the royal prerogative subsisting in the hands of the subject by grant from the king:" 3 Cru. Dig. 278. Under our government and laws this definition would not be strictly correct. Here they spring from contracts between the sovereign power and a private citizen, made upon a valuable consideration, for purposes of public benefit as well as individual advantage: and Chancellor Kent says "that franchises are privileges conferred by grant from the government, vested in private individuals." They contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantee to execute the conditions and duties prescribed in the grant: 3 Kent's Com. 458; *The People v. Utica Ins. Co.*, 15 Johns. 387 [8 Am. Dec. 243]. A privilege in the hands of a subject, which the king alone can grant, will be a franchise: with us, a privilege or immunity of a public nature which can not be legally exercised without legislative authority, must be equally a franchise. In the language of the civilians, it is private property by public use. Acts granting such franchises are declared to be contracts by many decisions of the supreme court of the United States and all the highest American state courts; and they ought to be construed by the well-established principles which regulate contracts: *Huidekoper's Lessee v. Douglass*, 8 Cranch, 1; *Charles River Bridge v. Warren Bridge*, 11 Pet. 611; *United States v. Gurney*, 4 Cranch, 333. Estates in such franchises rest upon the same principle as estates in land, being equally grants of right or privilege for a valuable consideration. They are not entitled to any special or peculiar favor in the eye of the law, but they have a right to strict and equal justice. Questions touching franchises are therefore to be examined upon principles of reason, policy, and justice, as the settled doctrines of the common law in trusts, covenants, and contracts between individuals. "Franchises," says Comyn, "may be forfeited by a breach of the trust upon which they are granted, and a perversion of the end of the grant or institution:" Com. Dig., Franchises, G. (3). So, a corporation may be for-

feited if the trust upon which it is granted be broken and the institution be perverted. This is the remark of Justice Holt in *The King v. The Mayor of London*, Show. 280; S. C., *sub nom. Sir James Smith's Case*, 4 Mod. 58. Now, reason and legal authority unite in pronouncing the only just ground of forfeiture of such a trust once made and vested by full performance of all preliminary conditions, to be, first, a total neglect or non-user of its duties; secondly, an abuse of them, improvidently, ignorantly, or fraudulently. In other words, there must be a non-user, or a misuser.

Lord Coke, in *The Earl of Shrewsbury's Case*, explains the term misuser, by saying that franchises, like offices, may be forfeited by abuser: 9 Rep. 45; and Justice Blackstone, referring to Coke, remarks, that franchises are also held to be granted upon condition of making a proper use of them: 2 Bl. Com. 153; *Earl of Shrewsbury's Case*, 9 Rep. 45. Whatever conditions corporations have assumed to perform they are bound to execute. All precedent conditions must be complied with strictly and literally or the estate will not vest. It is the performance of these conditions that creates the estate, and therefore they can not be dispensed with. Conditions subsequent operate upon an estate already created and vested, rendering them liable to be defeated and broken. Those conditions which work a forfeiture must be construed literally. Nevertheless, the grantee is bound to their substantial performance. When the estate is once vested, it is sufficient if the substance of the condition be performed to uphold the grant: 1 Roll. 426. If the condition be performed as near the intent as possible, it is sufficient. A condition annexed by operation of law must receive a like interpretation. There is no great difficulty in ascertaining the principles that should govern these conditions: Shep. Touch. 123; *Livingstons v. Livingston*, 15 Wend. 291. Analogous cases of individual conditional grants will give the rule. In cases of condition subsequent, if impossible to be performed, or rendered impossible by the act of God, the grantee is excused and the estate becomes absolute: Bac. Abr. 679, tit. Condition. So, if the waste be committed by a stranger, this shall not be a breach of the condition: *Bank of Auburn v. Aikin*, 18 Johns. 137; *Wood v. Jefferson County Bank*, 9 Cow. 194; *People v. Manhattan Co.*, 9 Wend. 378; *People v. Rens. & Saratoga R. R. Co.*, 15 Id. 127 [30 Am. Dec. 33]; *Caswell v. Districh*, 15 Id. 379. It is the neglect of the corporate duties or the abuse of

them, or, in other words, the failure to live up to the fundamental law of their being, that the law regards as sufficient cause for extinguishing their existence, and its justice and wisdom in this particular can not be doubted. Their own, as well as the public interest, requires that they should be held to a strict rational accountability. The terms and conditions of the grant being accepted, they can not be allowed to act beyond its scope, or fall short in the performance of their obligations: *Thompson v. The People*, 23 Wend. 587; *People v. Kingston & Middletown Turnpike Co.*, 23 Id. 219 [35 Am. Dec. 551].

In respect to a misuser, it must appear that there has been such neglect or disregard of the trust, or such perversion of it to the private purposes of the trustee or holder of the grant, as in some manner or some degree to lessen the utility to those for whose benefit it was instituted, or else to work some other public injury. "It must be in some sense or other, a misdemeanor in violation of the trust." The application of these principles will test the question of forfeiture as alleged in the replications.

Is the suspension of specie payment, continued for four years, a good cause of forfeiture? We have no doubt that a suspension continued a great length of time, without being produced by the fault of the state, and being adopted without any sufficient excuse or necessity, would constitute a good cause of forfeiture. It would be a violation of the object and ends of the grant. Cases might arise in which the suspension of specie payment might become necessary; and by which alone the objects of the grant could be preserved, but in such cases the necessity must be shown to be inevitable, and a resumption of specie payments must be resorted to as speedily as practicable and the moment that necessity has ceased to exist. Where the legislature has prescribed certain conditions upon which a corporation shall forfeit its franchises, those conditions supersede the common law, and they alone will constitute a just ground of forfeiture. But where the act of incorporation is silent as to what shall create a forfeiture, the common law doctrine is in full force; which is the case in the statute granting the franchise now under consideration. Courts will always lean against a forfeiture. Their object is to uphold and preserve the estate, unless it be clear that the rights vesting in it have been improvidently neglected or illegally abused. Long acknowledged insolvency beyond the hope of redemption would doubtless create a forfeiture: for it would be impossible for the trustees or holders of the grant to exercise their privileges and franchises

stripped of all the necessary functions and indispensable requisites for banking operations.

It is a settled rule of construction that an express covenant will do away with the effect of implied covenants: *Frost v. Raymond*, 2 Cai. 192; *Vanderkarr v. Vanderkarr*, 11 Johns. 122; and where a penalty for any omission is fixed by the statute creating the corporation, it is held that the penalty is the only punishment that can be enforced, and the omission is no cause of forfeiture: *Commonwealth v. Breed*, 4 Pick. 462; *Thompson v. The People*, 23 Wend. 562. The presumption is that the legislature intended the penalty as a satisfaction for the breach, and therefore the law can give no other judgment than what the sovereign power has fixed, so far as it regards that particular act: but such penalty will not save the franchise from forfeiture for non-user or misuser in other respects. If this be true, the mere suspension of specie payment can not create a forfeiture; for the thirty-eighth section of the charter provides that "if the bank suspends specie payments, or refuses to pay in current money of the United States any of its notes or obligations, or any funds on deposit, the person having the right to demand the same shall be entitled to recover damages at the rate of ten per cent. per annum." This section of the charter provides for damages for suspension of specie payments, and consequently that is the only penalty that the legislature intended to annex to the contemplated act. With the impolicy and injustice of such a provision we have nothing to do. The legislature has thought proper to make it one of the conditions of the grant, and we are bound to obey and respect its will. If the suspension of specie payment should be deemed a cause of forfeiture, the right of the state to enforce it, was complete upon the day when it took place, which the replication avers was the second of December, 1839. The state having since that time, as the plea shows, recognized the bank as an existing corporation, she is now estopped from setting this up as a ground of forfeiture.

The doctrine is the same as between landlord and tenant where the lessor seeks to enforce a forfeiture for condition broken: Co. Inst. 211, b (341). If the condition, says that great common lawyer, Sir Edward Coke, be broken for the non-payment of rent, yet if the lessor bringeth an assize for the rent due at that time, he shall never enter for the condition broken, because he affirmeth the rent to have a continuance and thereby waiveth the condition. And so, if the feoffor hath distrained for rent, for

non-payment whereof the condition was broken, he shall never enter for the condition broken, and if he accepted rent due at a day after, he shall not enter for the condition broken, because he thereby affirmeth the lease to have continuance: Woodf. L. & T. 203. So, where a forfeiture has been committed, they will not allow the lessor to take advantage of it, if he has done any act that amounts to a waiver: but then the forfeiture must be known to the lessor at the time of his acceptance of the acts done to constitute a valid waiver. The courts will not permit a lessor or landlord to say that his lessee has forfeited his estate when his own acts show that since such forfeiture he has admitted a continuance of the estate. When he knows of the forfeiture and afterwards permits the relation of landlord and tenant to subsist, he is estopped by his own acts from enforcing it: *Goodright v. Davids*, Cowp. 803; *Zouch v. Willingale*, 1 H. Bl. 311; *Goodright v. Cordwent*, 6 T. R. 219; *Browning v. Beston*, Plowd. 131; *Pennant's Case*, 3 Co. 64, b; *Hume v. Ball*, 1 Kent, 554 [mis-cited]; *Jackson v. Sheldon*, 5 Cow. 448. In the case of *The People v. President etc. Manhattan Co.*, 9 Wend. 354, it is expressly held that a forfeiture incurred by a corporation by non-performance of the terms of the condition contained in the charter is waived by subsequent legislative acts, recognizing the legal existence of the corporation. This principle conclusively proves that the borrowing of the money by the state, after the bank had suspended specie payments, in virtue of an act of the legislature, and the execution of her bonds whereby she became the debtor of the bank, estops her from insisting upon the fact of suspension as a cause of forfeiture. She certainly could not contract with a corporation that had no legal existence. The act of the legislature that authorizes the borrowing and the execution of the bonds, recognizes the legal personage of the bank, and it would be neither just nor equitable to permit the state, after having done these things, to set up the suspension of specie payment as a good ground of forfeiture. It was held in *The People v. Phoenix Bank*, 24 Wend. 431 [35 Am. Dec. 634], that the legislature could waive a forfeiture of corporate privileges, but that no other department of the government could.

It is clear that the state must have had notice of the suspension of specie payments. The suspension was a matter of public notoriety and general history; and independent of this, she had her own directors in the bank, appointed by herself, and of course cognizant of all its transactions. And it is equally manifest that if suspension could be considered as cause of forfeit-

ure, it was not such a one as to produce *ipso facto* a dissolution of the corporation. If the suspension was the consequence of continued insolvency, and afterwards in becoming solvent, the bank suspended all operations or destroyed her functions, we apprehend the state would have a right to dissolve the corporation. Such a dissolution can only be effected by judicial trial and judgment; and so it has been held even where the act has provided that in default of fulfilling the condition, the corporation should be dissolved: *Thompson v. People*, 23 Wend. 576; *People v. Manhattan Co.*, *ubi sup.*; *Bank of Niagara v. Johnson*, 8 Wend. 644; *Trustees Mount Vernon Society v. Hills*, 6 Cow. 33 [16 Am. Dec. 429]; *Briggs v. Penniman*, 8 Cow. 387 [18 Am. Dec. 454]; *Rex v. Amery*, 2 T. R. 515; *People v. Runkle*, 9 Johns. 147; *Terrett v. Taylor*, 9 Cranch, 43. It is laid down by Chancellor Kent in *Slee v. Bloom*, 5 Johns. Ch. 378, that a corporation may be dissolved if it becomes incapable of continuing its corporate succession or executing its corporate functions, as by the death of all its members, or the destruction of an integral part of it, or it may be dissolved by a surrender of its franchise in the hands of the government, or a forfeiture of its charter by a neglect or abuse of its incorporate privileges, and that in all cases the forfeiture must be judicially ascertained and declared; and though the power which is granted may be abused or abandoned, it can not be taken away but by regular legal process. The judgment in such case is that the party be ousted or the franchise seized into the hands of the government: *King v. Staverton*, Yelv. 190. That a corporation never can be dissolved for a non-user or misuser of its franchises until it has been called to answer for a breach of its trust or condition. The principles here laid down clearly show that the first and second replications are bad. We pass by for the present the third.

The fourth replication is that the bank, upon the seventh of September, 1840, sold five hundred bonds to the North American Trust and Banking Company for less than their par value, which the charter forbids. The fifth replication alleges the hypothecation of a portion of these bonds, which, it is contended, is a violation of the charter, and constitutes a good cause for forfeiture. The ninth section of the charter requires the bonds to be sold at par value, and it contains no clause that authorizes their hypothecation. There is certainly a limitation in the charter, requiring the bonds to be sold at par value, and the bank may be liable for disregarding this provision, or for the injury sustained in consequence of it; but this restriction is neither a

condition precedent nor subsequent to the vesting of the estate. The bonds could not be sold until they were executed; and they could not legally be indorsed or passed to the bank until her organization was completed. We deem it unnecessary to determine whether or not the sale and hypothecation of the bonds amount to a forfeiture, as that question is expressly waived by the subsequent acts of the legislature, or to say anything further in relation to the subject, or the rights and injuries that have accrued or been perpetrated by these acts, as they do not necessarily enter into the question of forfeiture.

The sixth replication is defective, for it merely alleges that the bank has failed to pay interest on the bonds since January, 1841. If the first and second replications are barred, surely this replication lays no good ground for a forfeiture. It does not even show that the state has been legally injured by her failure to pay interest. It does not allege that the state has paid the interest for the credit of the bank, or has made any provisions for such payment. The principles heretofore stated, clearly show this replication defective. For all ordinary injuries perpetrated by the bank, the state, bondholders, depositors, and note-holders have ample remedy and redress by the ordinary process of law, and the violation of any of these legal liabilities or duties in no instance works a forfeiture.

The seventh replication alleges a mere implied surrender of the corporate franchises. This is not sufficient. The state must show in what the surrender consists, and the authorities prove that a mere non-user is not a surrender (which could only take place by deed to the state), and the court could not presume a surrender from non-user, or a failure to exercise its privileges, unless the charter contains some express provision to justify such inference. Therefore this replication lays no good ground for a forfeiture.

This brings us to the consideration of the third replication, which avers that the bank by her deed of the second of April, 1842, transferred and assigned so much of all her rights, credits and effects, and property of every kind and description to certain trustees for the purposes and objects therein contained, whereby she destroyed and extinguished all her powers and corporate franchises. The replication admits the validity of the deed of assignment, and the demurrer, the facts as pleaded to be true; and the inquiry now is, do they constitute a good cause of forfeiture? The grant of the state was made to the stockholders for a valuable consideration, and upon the im-

plied condition that they would continue to exercise and perform the duties and obligations imposed by the charter: and these had for its aim and end the promotion of the public good as well as the private interest of the corporators, and they entered into the consideration of the contract and formed its obligatory force. Now, it is perfectly manifest upon principles of public policy, of reason and of natural justice, that a violation of this implied condition necessarily dissolves the consideration of the contract. The bank, by failing to perform her part of the agreement, has discharged the state from the continuance of the grant, and it not only becomes her right but it is her duty to resume it. Her faith and honor are pledged to protect the corporation in the peaceful enjoyment and full exercise of all its privileges and immunities, for they are supposed vitally to concern her social and political condition as matter of convenience and general utility, so long as the corporation has the will and possesses the power of discharging both her public and private engagements. This she unquestionably can not do, if, by her own voluntary act or deed of assignment, she has divested herself of all her corporate capacities: for if she be *civiliter mortuus*, how can it be said that her legal personage still lives, and that she has the power of perpetual succession? By such an act all her rights, privileges, and liberties have passed from the contract and management of the corporation: and being stripped of all her power and authority she ceases to exist. In the language of the law, she has abused her trust and perverted its object, and this works a forfeiture of her charter.

In *Slee v. Bloom*, 5 Johns. Ch. 378, Chancellor Kent holds that a corporation may be dissolved if it is incapable of continuing its succession or executing its corporate functions. Whenever there is a non-user or misuser of its franchises, the corporation may be adjudged dissolved for a breach of trust: *The King v. The Mayor of London*, Show. 274; *City of Exeter v. Glide*, 4 Mod. 33; or where an integral and governing part of it is gone and it has no power of restoring it, or doing any corporate act, it is so far dissolved that the government may resume the grant and extinguish its existence. Suffering any act to be done which destroys the end and object for which the corporation is instituted is equivalent to a direct surrender of its charter: 4 Com. Dig. 66; *The People v. Washington and Warren Bank*, 6 Cow. 216. And it has been expressly adjudged in the case last cited that if a bank assigns and transfers so much of her property to trustees as to render her incapable of continuing

her business operations, that is a good cause of forfeiture. The authorities are full and conclusive on this point: *The Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 479; *Briggs v. Penniman*, 8 Cow. 337 [18 Am. Dec. 454]. If the principles here stated be correct, then it incontrovertibly follows, that the deed of assignment in the present case to trustees operates as a forfeiture of the charter in contemplation of law, and that the state by her writ of *quo warranto* has the right to have that fact ascertained and declared by a judgment of this court, and to seize the franchise into her own hands. The third replication is adjudged thus to be good: and of course the demurrer to it is held bad. As all the other replications have been declared defective, judgment must be entered up in favor of the demurrer to each of them.

Whereupon, the counsel of the bank declining to rejoin to the third replication, judgment of seizure was pronounced, and the corporate existence of the Real Estate Bank ceased.

QUO WARRANTO, PLEADINGS AND PROCEEDINGS IN.—For a discussion of this subject, see the note to *People v. R. & S. R. R. Co.*, 30 Am. Dec. 33; also see *State v. Harris*, 36 Id. 460; *Bradley v. Commissioners*, 37 Id. 563; *State v. Bank of Charleston*, 39 Id. 135.

STATUTE GRANTING CORPORATE POWERS IS A CONTRACT after acceptance: *Lincoln Bank v. Richardson*, 10 Am. Dec. 34; *Crease v. Babcock*, 34 Id. 61; though see *Montpellier Academy v. George*, 33 Id. 585.

CORPORATION IS DISSOLVED by suffering act destructive of the object for which it was instituted: *Briggs v. Penniman*, 18 Am. Dec. 454; *Sles v. Bloom*, 10 Id. 273; and see *Penobscot Boom Corp. v. Lamson*, 33 Id. 656; *McIntire v. Zanesville C. & Mfg. Co.*, 34 Id. 436; *Boston Glass Mfy. v. Langdon*, 35 Id. 292.

WANTON AND INJURIOUS EXERCISE OF CORPORATE PRIVILEGES is ground for the interference of equity: *Attorney-general v. Stevens*, 22 Am. Dec. 526; such abuse works a forfeiture of the franchises: *State Bank v. State*, 12 Id. 234; and non-performance of the conditions of incorporation is *per se* a misuser that will forfeit the grant at common law: *People v. K. & M. Turnpike Road Co.*, 35 Id. 551; see also *People v. Phoenix Bank*, Id. 634.

NON-USER IS A GROUND OF FORFEITURE, WHEN: See *Clarks v. Calloway*, 2 Am. Dec. 706; though an equity court is not the proper tribunal for such a proceeding: *Attorney-general v. Stevens*, 22 Id. 526; *Society v. Morris Canal Co.*, 21 Id. 41; and see *People v. K. & M. Turnpike R. R. Co.*, 35 Id. 551.

FORFEITURE FOR ABUSE OR NEGLECT MUST BE JUDICIALLY DECLARED: *Vernon Society v. Hills*, 16 Am. Dec. 429; *Lehigh B. Co. v. Lehigh C. & N. Co.*, 26 Id. 111; *Regents v. Williams*, 31 Id. 72; *Boston Glass Manuf. Co. v. Langdon*, 35 Id. 292; *State v. Bank of Charleston*, 39 Id. 135.

ESTOPPEL OF PERSON DEALING WITH CORPORATION TO DENY ITS EXISTENCE: See *Dutchess Cotton Mfy. v. Davis*, 7 Am. Dec. 459; *Welland Canal Co. v. Hathaway*, 24 Id. 51; *Congregational Society v. Perry*, 25 Id. 455.

SURRENDER OF FRANCHISES FROM NON-USER IS NOT PRESUMED: *Regents v. Williams*, 31 Am. Dec. 72.

SUBSEQUENT RECOGNITION OF CORPORATION'S EXISTENCE: See *McIntire v. Zanesville Canal and Mfy. Co.*, 34 Am. Dec. 436; *State v. Bank of Charleston*, 39 Id. 135.

CASES

IN THE

SUPREME COURT OF ERRORS

OF

CONNECTICUT.

THOMPSON v. ROSE.

[16 CONNECTICUT, 71.]

EVIDENCE OF FALSE REPRESENTATIONS AS TO CREDIT OF PURCHASER of goods, made to the clerk of the vendor, is admissible as a part of the *res gestæ*, though not communicated to the seller until after the sale, where similar representations were immediately afterwards made by the buyer to the vendor himself, to induce the sale.

VENDOR MAY TREAT AS VOID A SALE made to one who purchases with a preconceived design not to pay for the goods bought.

ATTACHING CREDITOR WHO HAS NOT PARTED WITH HIS PROPERTY on the credit of goods fraudulently obtained by the debtor from a third person, is not to be regarded as a *bona fide* purchaser of such goods.

SEIZURE OF GOODS BY OFFICER IS NOT TORTIOUS, where he takes them under regular process in favor of a creditor of a fraudulent vendee, and therefore the vendor, to enable him to maintain trover therefor against the officer, must make demand upon him; but if, demand being made, the officer refuses to deliver them without requiring any evidence of the title of the person making the demand, he will be presumed to have waived his claim to such information.

REFUSAL TO DELIVER GOODS IS PRIMA FACIE EVIDENCE OF CONVERSION thereof, where a demand has been duly made.

OFFICER MAY PAY OFF LIEN OF COMMON CARRIER FOR FREIGHT on goods, in order to get possession of them, and upon doing so will stand in the place and have the rights of such carrier. But if, upon demand being made upon him by a claimant of said goods, he sets up no claim of lien, but makes an unqualified refusal, he will not be allowed afterwards to set up such lien as a defense, in an action of trover for the goods.

TROVER for a quantity of tobacco. The plaintiffs, Thompson and Adams, were partners in business in the city of New York, and Andrew Denison and Joseph W. Denison were doing busi-

ness at Suffield, Connecticut, under the firm name of A. & J. W. Denison. Joseph W. Denison applied to one Elliott, a clerk of Thompson & Adams, to purchase from said firm the tobacco in question, and represented to him that said A. & J. W. Denison were doing a good and safe business, and that the note which they proposed to give for said tobacco would be certainly paid. Said J. W. Denison thereupon, seeing Thompson in an adjoining room, went to him and made similar representations, upon which Thompson sold to him the tobacco. The representations made to Elliott were not communicated to Thompson until after Denison left the store. The goods were shipped to Suffield, where they were attached in the store of the Denisons by the defendant, by virtue of a writ in favor of Agnew & Son. The other facts appear from the opinion.

Toucey and T. C. Perkins, in support of the motion.

Hungerford and Cone, contra.

WILLIAMS, C. J. The first question presented upon this motion, is, whether proof of the representations made by Denison to Elliott, the clerk of the plaintiffs, and not communicated by him to them before the sale, was properly admitted in evidence; and cases have been cited to show, that the plaintiffs must have acted under the fraudulent representations made, or they could not recover. That principle is not denied; but still it is claimed, that this evidence is admissible; and cases are cited to show, that fraudulent representations made to others are admissible, where there is a combination to deceive: *Gardner v. Preston*, 2 Day, 202 [2 Am. Dec. 91]. And similar fraudulent practices about the same time, have been admitted where there was no combination to prove the *quo animo*: *Cary v. Hotailing*, 1 Hill, 311 [37 Am. Dec. 323]; *Hawes v. Dingley*, 17 Me. 340. How far those cases apply to this we need not determine.

When we look at the facts in this case, we think that the evidence was admissible as part of the *res gestæ*. Denison had before been disappointed in obtaining these goods, in consequence of the information which this clerk, the witness, had obtained. Whether he knew this particular fact or not, does not appear; but he knew that this man was a clerk of the plaintiffs; and doubtless hoped, through his agency, to effect his object. He then came to the plaintiffs' shop to obtain the article. He finds the witness; complains to him that this firm was not trusted before; represents that they could get credit elsewhere; that they were doing a safe business; and that their note was

sure to be paid. If upon this Elliott had sold the goods, there could be no doubt that the plaintiffs could recover, if they proved the representations false and fraudulent; for it would be the same thing as if made to the plaintiffs themselves: *Allen v. Addington*, 7 Wend. 22. But after saying this to Elliott, he sees one of the plaintiffs in the adjoining room, the door being open, and goes up to him with similar representations. This, then, was in fact a continued conversation, by Denison, with the agents of the plaintiffs and the plaintiffs themselves, carried on by him, to effect a single object—to get this tobacco upon credit. The conversation with the clerk not being repeated to the principal, might not prove that the plaintiffs were deceived by that communication; but it would tend to show, that the communication made to them, if false, was fraudulent; it was calculated to influence the opinion and to procure the aid of this clerk, or at least to throw dust into his eyes, and prevent his interference. If, instead of these representations, or with these representations, Denison had told this clerk, that he would make him a present if he would not say anything, was he inquired of; this surely would have been admissible evidence, though in fact it had no effect upon the sale, as he was not inquired of; but it would have been proper evidence to show the arts made use of, to effect the object. The evidence in the case before us is not so strong; but is, we think, of the same character, showing a set design to obtain these goods by these false representations, made at the same time as those made to the plaintiffs, and to those persons, who otherwise would have been most likely to have undeceived him.

The next question is, if this sale was obtained by fraudulent representations, whether the plaintiffs can treat it as void? We believe, that the rule is now settled, that if a person purchases goods with a preconceived design not to pay for them, the vendor has a right to treat the sale as void: *Read v. Hutchinson*, 3 Camp. 352; *Noble v. Adams*, 7 Taunt. 59; *Earl Bristol v. Wilsmore*, 1 Barn. & Cress. 514; S. C., 8 Eng. Com. L. 514; *Kilby v. Wilson*, Ry. & M. 178; S. C., 21 Eng. Com. L. 726; *Hawse v. Crowe*, Ry. & M. 414; S. C., 21 Eng. Com. L. 477; *Ferguson v. Carrington*, 9 Barn. & Cress. 59; S. C., 17 Eng. Com. L. 36. This principle has been often recognized in the state of New York, and more than once in our superior court. But it is said, that if goods so obtained are sold to a *bona fide* purchaser, the plaintiffs would have no right to retake them; and that the defendant stands in the light of a *bona fide* purchaser. In support of the first prop-

osition, *Parker v. Patrick*, 5 T. R. 175, and *Mowrey v. Walsh*, 8 Cow. 238, are cited. The case of *Parker v. Patrick* seems to have been considered as law, and followed, by the courts in Maine and New Hampshire: *Gilbert v. Hudson*, 4 Greenl. 345; *Bradley v. Obear*, 10 N. H. 477.

The view we have taken of the case before us does not require us to examine those cases, in the same manner, as under other circumstances we might feel called upon to do. It is enough to say, that in England, the former case has been doubted, by high authority: *Peer v. Humphrey*, 2 Ad. & El. 495; S. O., 29 Eng. Com. L. 158; *Tamplin v. Addy*, 8 Cow. 239, note. So, too, the case of *Mowrey v. Walsh* is doubted in the state of New York: *Cary v. Hotailing*, 1 Hill, 306 [37 Am. Dec. 323]; *Lloyd v. Brewster*, 4 Paige, 537 [27 Am. Dec. 88]. But however this might be, where an innocent person has been deceived, by the credit which the vendee may have acquired by goods so purchased, we can not think, that the sheriff (or those whose interests he represents), who attaches the goods as the goods of such fraudulent vendee, stands in the relation of a *bona fide* purchaser. Some general expressions of this kind may have fallen from the court of Massachusetts, upon that subject. But we believe no case is to be found there or elsewhere, where there has been no fault on the part of the vendor of goods, except that he has been deceived, by the fraud of his vendee, that it has been holden, that the creditors of such vendee could seize the goods, when he himself could not hold them, except where the debt accrued after the purchase of the goods in question, and upon their credit: *Gilbert v. Hudson*, 4 Greenl. 345; *Bradley v. Obear*, 10 N. H. 477.

On the contrary, in the case of *Tamplin v. Addy*, above cited, which was a suit against the sheriff, Chief Justice Best says: "There is no principle of law better established than that which declares, that no property passes by a fraud." In such case, "the right remained in the original owner, no matter in what hands they found their way:" 8 Cow. 241. And a similar doctrine has been repeatedly holden, by the supreme court of the state of New York, except so far as any exception may exist under the authority of *Mowrey v. Walsh*, 8 Cow. 238; *Hitchcock v. Covill*, 20 Wend. 167. And we are unable to see how, unless there be some unreasonable delay on the part of the vendor in reclaiming his property, the attaching creditors can obtain anything by their attachment, except the right their debtor had. Had the property been stolen from the vendee, or were it in his hands as bailee or factor, there would be no question as

to the right of the original owner. And it is not unfrequently the case, that a man whose property has been stolen, has been guilty of as great negligence regarding it, as the man who has been deluded by the arts of a swindler.

By the statement of facts in this case, it appears, that the Agnews, the creditors on whose suit these goods were attached, sold the goods on which their debt was founded on the twenty-ninth day of January, 1842; and the plaintiffs sold the goods in dispute to Denison, on the tenth of February, following; and these goods were forwarded to Suffield, without any particular mark, by public conveyance; and were attached upon the day of their arrival, and after the Denisons' business had been broken up. The attaching creditor must, therefore, assume the broad ground, that in all cases, the rights of an attaching creditor must prevail against the rights of an owner who has been cheated out of his goods, by false representations. For here no false credit was held out, like the case supposed by Chief Justice Parsons in *Hussey v. Thornton*, 4 Mass. 407 [3 Am. Dec. 224], or as existed in *Gilbert v. Hudson*, 4 Greenl. 347. The cases cited do not, therefore, support the position of the defendant. On the contrary, in a recent case in New Hampshire, where the court adopted the principle in *Parker v. Patrick*, as it respects a *bona fide* purchaser, they expressly decided that an attaching creditor, who had not parted with his property upon the credit of these goods, did not stand upon the same ground as a *bona fide* purchaser: *Bradley v. Obear*, 10 N. H. 477.

Another objection to the charge, is, that the court did not tell the jury, that the demands were insufficient, because the title of the plaintiffs was not made known to the defendant. In answer to this, it is said, in the first place, no demand at all was necessary, as the taking was tortious. It is true, that where there is a tortious taking, a demand can no more be necessary than if the action was trespass for the same taking. We are not satisfied, however, that this case is of that character. Denison must have had a qualified interest in these goods, liable to be defeated—as a contract made with an infant—until his election is made, we see not why it might not be legal, or even perhaps the duty of the sheriff to secure that interest. If so, the seizure was not a tortious act. Of course, to establish the plaintiff's claim, a demand must be made. The court below proceeded upon that idea, but told the jury, that if upon such demand, there was an unqualified refusal to deliver the property without requiring any evidence of the plaintiff's title, or expressing any doubts about

the same, they might presume a waiver of his claim to such information; and we concur entirely in this opinion. The defendant was an officer, whose situation is frequently one of much difficulty, from the conflicting claims by which he is surrounded; and he is entitled to a liberal construction of his acts. But he must act fairly and reasonably. If property, which came rightfully into his hands, is demanded, by a stranger, he will be protected in requiring reasonable information as to the rights of the person making demand, if he has any reasonable doubt upon the subject; and should be protected in any reasonable delay necessary to procure information. But when he asks for no delay; when he does not profess to have any doubt; but gives an unqualified refusal; he assumes upon himself the responsibility of deciding, and without inquiry and without hesitation, that his rights are superior to the plaintiffs'.

From a very early period it has been holden, that it is good evidence *prima facie* to prove a conversion, that the plaintiff required the defendant to deliver the goods, and he refused; and thereupon it shall be presumed he converted them to his own use: *Chancellor of Oxford's Case*, 10 Co. 56; *Agars v. Lisle*, Hutt. 10. And Holt, C. J., went so far as to say, that the very denial of goods to him who has a right to demand them, is an actual conversion: *Baldwin v. Cole*, 6 Mod. 212. The true principle, however, is given in *Isaack v. Glark*, 2 Bulst. 314, where the court all agreed, that *prima facie* a denial, when demanded, is good evidence to a jury of a conversion; but if the contrary be shown, then the same is no conversion. This principle is recognized by Judge Story, in *Watt v. Potter*, where a question was made as to the authority of the persons making the demand. The learned judge, admitting that such persons must have authority, adds, but if the refusal does not turn upon the supposed want of authority—if the party waives any inquiry into the authority, or admits its sufficiency, and puts his refusal upon another distinct ground, which can not, in point of law, be supported—then the refusal, under such circumstances, is presumptive evidence of a conversion: 2 Mason, 81. Here, though he did not state his grounds for refusal, yet he made an unqualified refusal. This, then, unexplained, is evidence of a conversion. He does not attempt to explain it; he asks no information, nor any delay, that he may inquire; he does not pretend that he does not understand the nature of the plaintiffs' claim, or has a lien for which he seeks indemnity, but contents himself with a cool, unqualified refusal. The fair presumption then is, that he relied

upon the indemnity of the creditors, or knowing the nature of the plaintiffs' claim, he was ready to put them at defiance. Thus he denied the plaintiffs' right, and waived any claim in support of it.

Another exception taken to the charge, is much of the same character, viz.: that the court should have told the jury, that the defendant had right to detain the goods until the freight was paid, which the officer had paid to the common carrier. To this the plaintiffs reply, that the defendant could not, by his wrongful act, acquire any lien upon the goods; nor could such lien be assigned. It has been adjudged, that a lien could not be acquired, by a tortious act: *McCombie v. Davies*, 7 East, 5; *Everett v. Saltus*, 15 Wend. 478. But, we have held, that in the situation this property was in, the defendant might attach it; and if he might seize it, it would seem to follow, that he must take legal measures to secure it. This could not well be done, but by taking it into his possession; and he could not do this without regard to the rights of those who had some superior interest in it. It would seem, therefore, as if upon this attachment, the officer must, to secure the benefit of it, pay the lien, and take the property into his possession; and if so, we think it would follow, that he must stand in the place and have the rights of the person whom he has, as it were, been involuntarily compelled to indemnify. But here, again, the defendant is met, and we think conclusively, with the fact, that he set up no such claim at the time, but made an unqualified refusal. Had this refusal been qualified, by this claim of lien, the plaintiffs might have met it, and obviated it; but the defendant keeps it a secret in his own breast, and now seeks to defeat the plaintiffs' action, by a claim before unknown.

In *Thompson v. Trail*, 2 Car. & P. 334; S. C., 12 Eng. Com. L. 602, where goods had been delivered on board a vessel, and a receipt taken, the vendee having failed, the shipper demanded the goods, but made no offer of freight or compensation. The captain, upon demand, merely said, he had signed a bill of lading. Chief Justice Abbott said, this was a conversion: though it was insisted, that he had a right to compensation. The chief justice added, "if the captain says, I can't deliver the goods to you, but will deliver them to A., B., or C., that is a conversion." And in *Everett v. Saltus*, 15 Wend. 474, 478, where the defendants claimed, upon demand, to be purchasers of the property, and upon trial claimed a lien, the supreme court held, that if the defendants had a lien, they waived it, by not putting themselves

on that ground, when the property was demanded. They denied the plaintiff's right, and set up a title in themselves, independent of the lien. Whoever, says Judge Story, undertakes tortiously to deal with the property of another as his own, or tortiously detains it from the owner, is, in contemplation of law, guilty of a conversion of it: 2 Mason, 81. When, then, the defendant had in his possession the property of the plaintiffs, and refused to deliver it up, on demand, he assumed to deal with it as his own, and in effect denied the right of the plaintiffs. If he had a claim unknown to the plaintiffs, fair and correct dealing required that he should make it known, that the plaintiffs might be apprised of the right which he claimed, and have opportunity to cancel it, or contest it. The defendant chose to place himself upon other grounds, by this unqualified refusal; and we are all of opinion, that he must abide the issue which he chose to take; and that there should be no new trial.

In this opinion the other judges concurred.

New trial not to be granted.

CITED in *Lucky v. Roberts*, 25 Conn. 492, to the point that whenever a conspiracy is alleged as effecting a fraudulent purchase of goods, it is the constant practice of courts to receive as evidence of the character of the act, like fraudulent acts of the same nature, in furtherance of the fraudulent design; in *Clark v. Hale*, 34 Id. 401, to the point that an absolute and unconditional refusal of an officer to deliver property, in the absence of satisfactory evidence to rebut the presumption of a conversion, is sufficient to warrant the jury in finding for the plaintiff, in an action of trover against such officer; and in *Folsom v. Manchester*, 11 Cush. 337, to the point that it is sufficient evidence of a conversion to show that the plaintiff, having a right to the possession of the property, demanded it of the defendant, and that the latter refused to deliver it.

SALE OF GOODS INDUCED BY FRAUDULENT REPRESENTATIONS PASSES NO TITLE to the fraudulent vendee: See *Cary v. Hotelling*, 37 Am. Dec. 323, note 327, and the cases there cited and collected.

EVIDENCE OF OTHER FALSE REPRESENTATIONS, WHEN ADMISSIBLE to show the *quo animo*: See note to *Cary v. Hotelling*, 37 Am. Dec. 323.

SAGE v. HAWLEY.

[16 CONNECTICUT, 106.]

AVERMENTS OF MATTERS OF SUBSTANCE IN DECLARATION need only be proved substantially, but matters of description must be proved exactly. And where *assumpsit* is brought to recover money alleged to be due from the defendant to the plaintiff, and by mistake omitted in a settlement between them, the averments of the time of such settlement, and of the particular sum due, and not embraced therein, are averments of matters of substance not of description.

GENERAL INDEBITATUS COUNT IN DECLARATION IN ASSUMPSIT will sustain a recovery for items of indebtedness omitted by mistake on a settlement of accounts between the parties to such action.

DEBTOR IS NOT "WITHOUT THIS STATE," within the meaning of the Connecticut statute of limitations, where, being a citizen of, domiciled, and resident within that state, with his family, he temporarily, for business purposes, goes to another state and remains there for eight months at a time on two separate occasions; and, therefore, the time of such absences is not to be excluded in computing the time limited for the commencement of a suit against him. **WILLIAMS, C. J., contra.**

ASSUMPSIT. The declaration alleged that on the fifteenth of June, 1836, the plaintiffs and the defendant adjusted accounts, and that at the time of said settlement certain sums of money, among others the eighty dollars referred to in the opinion, were by inadvertence and mistake omitted and overlooked, and were not included in said accounts, although they were then due and owing from the defendant to the plaintiffs. The defendant pleaded *non assumpsit*, and *non assumpsit infra sex annos*. The jury returned a verdict for the plaintiffs, and the defendant moved for a new trial. The other facts sufficiently appear from the opinion.

W. W. Ellsworth and O. S. Seymour, in support of the motion.

T. C. Perkins, contra.

STORRS, J. The first ground on which a new trial is asked in this case is, that the proof adduced by the plaintiffs did not support the declaration as to the item of eighty dollars therein mentioned, and that the jury should have been so instructed: and the particular in which it is claimed to have been defective, is, that it failed to prove the mistake as to that item to have been of the precise sum, and to have occurred at the precise time, alleged in the declaration. The validity of this claim depends on the question whether the statements in the declaration, of the particular time of the settlement when the alleged mistake occurred, and of the particular amount of the sum due to the plaintiffs and not embraced in such settlement, are to be deemed allegations of what are termed matters of substance, or of matters of description. If they are of the former kind, they need only to be proved substantially; if of the latter, they must be proved exactly. We have no doubt that the averments in question are those of matters of substance, and not of description; and therefore, that they were supported by the evidence offered by the plaintiffs.

The true sense and meaning of the allegation respecting the

settlement, is no more than that such a settlement took place between the parties; and of that respecting the indebtedness, merely that there was an indebtedness from the defendant to the plaintiffs, omitted to be embraced in such settlement. The time of such settlement is immaterial, provided it took place at any time prior to the commencement of the suit, which must be proved on the trial; and the precise amount of such indebtedness is unimportant to the maintaining of the action; it is sufficient that any such indebtedness exists; and its amount must also be proved on the trial. The additional statements of a particular day when the settlement was made and a particular amount of indebtedness, are mere formal averments, and were obviously introduced, not for the purpose of more particularly describing the settlement or indebtedness, or of defining more precisely the cause of action (for much more minuteness would have been requisite for that purpose), but only in order to comply with the familiar rules of pleading on the subject of certainty, which require that a time and place should be mentioned when and where every material fact took place; and that where a material sum or quantity is mentioned, its amount should be specified. Those rules undoubtedly made it necessary for the plaintiffs to state, as matter of allegation, some particular amount of indebtedness from the defendant to the plaintiffs, and (on the supposition that the general *indebitatus* count would not answer, but that it was necessary to declare specially, as the plaintiffs have done here, averring the settlement and the mistake) some particular day on which such settlement took place. This particularity was requisite, in order to render the declaration, as matter of pleading, unexceptionable; but, by the rules of evidence, allegations of time, place, sums, and quantities need not be proved precisely as laid, unless they are so descriptive of something which is essential to the claim of the party averring them, that the identity between the thing alleged and proved would be thereby destroyed, and the proof be subject to the imputation of what is termed a variance; which the defendant has very properly disclaimed in the present case. The principles applicable to this point are too familiar to require illustration, and will be found to be very clearly stated and elucidated in *Purcell v. Macnamara*, 9 East, 157, and in *Greenl. Ev.*, pt. 2, c. 2.

Our courts, many years since, held that an action of general *indebitatus assumpsit* would not lie, after a settlement of accounts, to recover for an item of indebtedness omitted by mistake in

such settlement; but that the declaration should be special, pointing out such mistake. And it is urged, by the defendant, that as the cause of action must be thus particularly stated, a corresponding particularity of proof is necessary, in order to secure to him the benefit intended by requiring this mode of declaring. The rule that allegations of matters of description only need be exactly proved, applies, however, to all declarations in personal actions, and is not confined to those only where the allegations are of a general character, like general *indebitatus assumpsit*: and that rule of evidence was not intended to be varied or affected by the decisions last referred to, which went upon the ground that, unless the declaration was special, the defendant would be unapprised by it of the character of the claims made upon him, and would be therefore liable to be surprised on the trial, by proof of those of which he had had no notice. The range of the plaintiff's proof is, of course, more restricted, as the declaration is more special; but the nature or competency of the evidence to prove the issue, is not thereby affected; and the present is a question of evidence, and not of pleading.

Notwithstanding, however, the decisions referred to, we should, in accordance with the doctrine which universally prevails elsewhere, and the principles at present generally applied to actions of general *indebitatus assumpsit*, now hold, that a general *indebitatus* count would sustain a recovery for items of indebtedness omitted by mistake on a settlement of accounts, if there were no other objection. Without going at large into the subject, it may be sufficient to say, that, at the early period when those decisions were made, the general counts in *assumpsit* were comparatively rarely used; their utility and safety had not been completely tested in practice; and they were, therefore, regarded with a greater degree of jealousy and disfavor than at present; and with more than long experience since has shown to be necessary. The apprehended disadvantage to the defendant from the generality of the count, is entirely obviated, by the practice of allowing him to require a bill of particulars from the plaintiff: and indeed, as remarked by Ellsworth, J., in *Hart v. Smith*, Kirby, 130, this kind of action, from the equity of the principles on which it proceeds, and the extensiveness of the remedy it gives, is now highly favored.

The other ground on which the defendant claims a new trial, involves the true construction of that proviso in the statute of limitations, which excludes from the computation of the times

limited for bringing suits in the cases therein mentioned, the time during which the party, against whom there may be any such cause of action, shall be without this state. The material facts which appear, bearing on this point, are, that the defendant, being a citizen of and domiciled within this state, and residing therein with his family, consisting of his wife and several children, publicly left the state, at two successive times, and went to one of the southern states, where he remained each time for the period of about eight months, for the purpose of taking charge of a store of goods there, and attending to the business of said store; and that he so left for the purpose of a temporary absence only, and with the intention of a speedy return to his residence in this state, where he left his family during his absence, and without abandoning, or intending to abandon, his home or domicile in this state; and that he continued his intention of returning during his said absence. And the question is, whether the time during which he was so absent, should be excluded in computing the six years limited for the bringing of this suit.

The judge below proceeded on the ground that the defendant was, during said absences, personally out of this state, and so, during that time, within the very language of the proviso of the statute; and did not feel at liberty to depart from its plain, literal meaning. A construction of this proviso, which should be so literal as to exclude, in all cases, from the computation of the time limited for bringing suits, every portion of time, however small, during which a person domiciled in the state should, with whatever intention, be personally absent from it, would be attended with such practical inconveniences, and would indeed fall so far short of the object to be attained in the passing of the law, that we can not believe that it would be consonant with the intention of the legislature, which, when ascertained, must prevail over the literal sense of the terms they have used. The intercourse between our citizens and the other, especially the adjacent states, on matters of business, health, and pleasure, has become so general, and the absences resulting from it are frequently for so short periods of time, and those often so sudden that they can scarcely be anticipated by themselves or others, that it would be impracticable to ascertain or prove them, with any ordinary, if indeed with the greatest degree of diligence; and we think, that it would be doing violence to the intention of the legislature to suppose, that the proviso was enacted with reference to these casual and temporary occurrences. Indeed, the construc-

tion claimed by the plaintiff, would exclude from the computation those comparatively minute periods of time, during which that large class of our citizens living in towns bordering on other states, should be engaged in the adjacent towns in those states, in attending perhaps to portions of their farms there situate, or to those almost daily matters of business which would call them thither. And with respect to another considerable class, who are engaged in a sea-faring life, and therefore have occasion to be away from the state for much longer periods in the prosecution of their business, such construction would also exclude these periods. But it has never been supposed, that our statute of limitations has been suspended by such absences. Although it would be competent for the legislature to provide, that the computation of the times limited for bringing suits should be interrupted by absences of these descriptions, we think, that the language of the act should be much more explicit than that used here, before we should be required to infer such an intention.

The great object of the statute of limitations, enacted on motives of public policy as well as to protect private rights, was to silence stale claims, or prevent the enforcement of those where the failure of the memory of witnesses, or their death, or the loss of other evidence, might defeat justice, or at least render its administration uncertain and hazardous, by requiring claimants to lay the foundation, by a suit, for bringing their demands to a legal adjudication, within such reasonable period of time that these consequences would not probably ensue. Hence it is provided, by that statute, that the actions therein mentioned shall not be brought but within the times therein limited, after the right of action shall accrue. The bringing of a suit, which is the commencement of a legal proceeding for an investigation and decision of the claim, is the act which is intended by the statute to be expedited, and that by subjecting the plaintiff to the loss of his claim, in case he shall have neglected to prosecute it within the prescribed time. But it was obvious, that there might be cases where although a suit should be seasonably commenced, the object of it would be frustrated, without any such fault on his part as should subject him to a forfeiture, or loss of his demand; and others, where there would be an entire omission to commence a suit within the time limited, without the least fault or neglect on the part of the claimant, and where the principles of natural justice would therefore plainly require that his rights should be saved. In the former class, for in-

stance, the legislature have included those cases where a judgment obtained by a plaintiff has been reversed on writ of error, and also those where, after a verdict for the plaintiff, on a motion in arrest, judgment is given against him that he take nothing by his writ or declaration; in which cases a further time is allowed, by the eighth section, for commencing a new suit. In the latter class, are embraced, among others, those cases where the situation of the defendant was such that it was impossible to commence a suit against him, in which the rights of the parties could be effectually determined. To preserve the rights of the plaintiff, in such a case, the proviso in question, and which is contained in the same section, was, in our judgment, intended. It provides, that "in computing the time limited in the several cases aforesaid, the time during which the party, against whom there may be any such cause of action, shall be without this state, shall be excluded from the computation:" Stat., p. 406, sec. 8 (ed. 1838). Considering this provision as being designed to protect the rights of the plaintiff, in those cases where it was not practicable for him to enforce them, by a suit, in consequence of the absence of the defendant from the state, its justice and propriety are most obvious.

But it is not necessary, nor does justice seem to require, that we should extend it by construction, so far as to include in the computation of the time limited for bringing suits, those periods when the defendant was personally out of the state, but during which the plaintiff might, notwithstanding, have commenced a personal action against him, by the judgment in which he would be conclusively bound; and especially, in view of the difficulties already adverted to, which would follow from such a construction. If the defendant is not domiciled, or has not his residence within this state, no action can be brought in his absence against him, by the judgment in which he would be personally bound, because there would be a want of legal notice to him of the suit; although it would be in the power of his creditor, if the property of such defendant, or debts due to him within the state, are discovered, to proceed against them specifically or *in rem* under our statutes of foreign attachment, and appropriate them on the judgment which should be obtained. That, however, would be the extent of the operation of the judgment. Since therefore, in such a case, it would not be in the power of a creditor to institute any legal proceedings, by which his legal rights could be conclusively ascertained and fixed, it would be manifestly unjust to preclude him from such

proceedings, whenever it should be in his power to commence them. But if the defendant is domiciled or resident within the state, although he may be temporarily absent therefrom, provision is made by our laws, by which the plaintiff may commence a personal action against him, in which a judgment may be obtained, which will be binding and conclusive between the parties to all intents and purposes; and therefore, in such a case, no saving of the right of the plaintiff to commence such suit is necessary.

Looking at the policy and provisions of the whole act, a majority of the court are of opinion, that the provision in question does not apply to the temporary personal absence from the state of a defendant domiciled within it, and retaining that domicile; but that it embraces those cases only, where the defendant is without the state, under such circumstances that a personal suit can not be commenced against him; and therefore, that the time during which the defendant in the present suit was absent from the state, under the circumstances stated in this motion, ought not to have been excluded in computing the time limited for the commencement of the suit. So little light is shed upon the statute in question, by the statutes in other states of a similar character, which have been adverted to, the phraseology, if not the policy, of which appears to be different from ours, that it is not considered necessary to remark upon them.

We are of opinion, for these reasons, that on the last ground urged, a new trial should be granted.

In this opinion CHURCH, WAITE, and HENMAN, JJ., concurred.

WILLIAMS, C. J., delivered a dissenting opinion, in which he disagreed with the majority of the court, on the last point in the syllabus

MEANING OF THE WORDS "WITHOUT THE STATE," and other words of similar import: This subject is discussed, and the cases bearing on it are collected, in the note to *Moore v. Armstrong*, 36 Am. Dec. 74-77.

THE PRINCIPAL CASE IS CITED in *Waterbury v. Bethany*, 18 Conn. 430, to the point that the ordinary meaning of the word *residence* is that of *domicile*, "our home for the time;" and in *Remington v. Noble*, 19 Id. 387, to the point that an action of general *indebitatus assumpsit* can be sustained after a settlement of accounts to recover for an item of indebtedness, omitted by mistake in such settlement, and that the declaration need not be special, pointing out such mistake. In this latter case, the court also explain the scope and extent of the decision in the principal case, on this point. It is also cited in *Blodgett v. Utley*, 4 Neb. 29, to the point that the mere temporary absence of a debtor from the state, when he has his usual place of residence therein, where service of summons can be had upon him, does not suspend the running of the statute of limitations.

BROWN v. SLATER.

[16 CONNECTICUT, 192.]

WHERE MAN ON EVE OF MARRIAGE AGREES IN WRITING TO PAY TO HIS INTENDED WIFE at the rate of a certain sum per week as long as she shall remain his wife, this contract will be construed as providing for the payment of a sum of money after the termination of the coverture; and commissioners upon insolvent estates, having, by the laws of Connecticut, the powers of courts of law and of chancery, ought to allow the claim of the widow made under such contract.

APPEAL from a report of commissioners on the estate of Elias Brown, deceased, represented to be insolvent. The commissioners rejected the claim of the appellant, made under the following contract, signed by the deceased prior to their marriage: "Farmington, October 15, 1825. In consideration of Mrs. Nancy Hart's becoming my wife, I promise to give her at the rate of one dollar per week from the date of our marriage, so long as she remains my wife. Elias Brown." The parties were shortly afterwards married and lived together until January 10, 1843, when he died. The other facts appear from the opinion.

Fellowes and Matson, for the appellant.

Toucey and T. C. Perkins, for the appellees.

WILLIAMS, C. J. The defense to the claim of the appellant, is, that this was a contract, which was extinguished, by the marriage of the parties. By the laws of this state, commissioners upon insolvent estates have the powers of courts of law and of chancery, so that if this claim can be supported before either tribunal, it should have been allowed. It is doubtless well settled, that if a woman takes for her husband a man who is indebted to her, the debt is thereby discharged or extinguished: Co. Lit. 264, sec. 445. But it is now equally well settled, that if a man about to enter into the marriage relation, as an inducement thereto, promises his intended wife to pay her a sum of money, or make other provision for her, after its termination, such contract will not be extinguished, by the marriage: *Smith et Ux. v. Stafford*, Hob. 216; *Gage v. Acton*, Com. 67; S. C., 1 Salk. 325; S. C., 1 Ld. Raym. 515; *Milbourn v. Ewart et al.*, 5 T. R. 381. Had then this contract expressly provided, that payment should be made on the termination of the marriage, it would have been governed by those cases.

But it is said that this contract is of a different character; that payment is to be made during marriage. In the construction of contracts, we are to look at the intent of the parties, and

give effect to that intent, if it can be done consistently with the principles of law. This, says Judge Paterson, is the great rule of interpretation: *Hollingworth v. Fry*, 4 Dall. 347. And if a contract admits of more than one construction, one of which will render it inefficacious, or nullify it, that construction should be adopted, which will carry it into effect: *Archibald v. Thomas*, 3 Cow. 284. For there is no presumption against the validity of contracts: *Pugh v. Duke of Leeds*, Cowp. 714. Nor can we suppose, that the parties sit down to make a contract providing for a particular event, when that very event would make it void.

The appellees, however, say, that the court in construing this contract are to look at the contract itself only, and can not go out of it, to discover what was the intent of the parties, by the words used. If by this is only meant, that parol evidence of intention is not to be given to explain a contract ambiguous on its face, it is correct. But we see not why the situation of the parties, and the subject-matter of the transaction, may not be brought into view, to assist in determining the meaning of a particular expression. In *Sumner v. Williams*, 8 Mass. 214 [5 Am. Dec. 83], the court say, nothing can be more equitable, than that the situation of the parties, the subject-matter of their transactions, and the whole language of their instrument, should have operation, in settling the legal effect of their contract. And in *Wilson v. Troup*, 2 Cow. 228, 229 [14 Am. Dec. 458], it is said, by Woodworth, J., this extrinsic evidence is admissible, so far as to ascertain the circumstances under which the writing was made, and the subject-matter to be regulated by it. So in *Milbourn v. Ewart*, 5 T. R. 381, 385, where a suit was brought upon a bond, and the defendants pleaded the intermarriage of the parties, and the plaintiff replied that the bond was made in contemplation of marriage between the parties, and with intent that, if it took effect, the plaintiff should have the full benefit and effect thereof; it was objected, that such an agreement as was stated in the replication could not be let in to explain a deed; but Ashurst, J., said, he saw no objection to the averment in the replication, for it appeared from the defendants' own showing, that the marriage was solemnized on the day when the bond bears date; and the averment of the plaintiff, that the bond was given in contemplation of marriage, and as a settlement on the wife, does not militate against the bond and condition; on the contrary, it explains and is in affirmance of the condition of the bond. But in this case, the writing itself

explains all that is necessary to show the subject-matter and circumstances of these parties.

It appears evident that the parties contemplated an intermarriage, and that this contract was made in reference to it; and it purported to hold forth a benefit to the woman, by way of inducing her consent to it. In consideration of her becoming his wife, he promises to pay her a sum of money, the amount of which is to be determined, by the time which she continues to live with him as his wife, at the rate of one dollar per week. Now, when was this money payable? It is not contended, that it was payable immediately; but the appellees say, it was payable weekly; the other party claims, it was payable at the termination of the term limited.

By giving the former construction, we say that the parties made a contract, which was of no value, but which became void when the very event happened which was to make it beneficially operative. It is said, in reply to this, they were willing to trust each other's honor. If this was so, we can see no possible object in reducing the contract to writing. It can not be presumed, that the parties intended such a consequence. On the other hand, the parties must be supposed to have intended something, by this agreement—a benefit was intended to the woman; the sum they should not fix, because they could not tell the time she would spend; and they seem to have thought it reasonable, that it should be in proportion to the length of the time; that she should not receive the same sum, if she lived with him six months, or a year, as if she lived with him twenty years. They are evidently looking to a provision for her, when this union shall cease. He, therefore, stipulates to give her at the rate of one dollar a week—not a dollar a week, but *at the rate*. Now, had he made a contract with a laborer for six months, to pay him at the rate of ten dollars a month, it would have been one entire contract, terminating at the end of the six months: *McMillan v. Vanderlip*, 12 Johns. 165 [7 Am. Dec. 299]; *Reab v. Moor*, 19 Id. 337. It must be evident, that the provision contemplated, is not for the immediate support of the wife; for that he was bound by the law to furnish; but it is a provision for her, when this legal support shall cease, and when she might suppose the legal provision would be insufficient. If it was intended to supply her wants, when the marriage terminated, nothing would be more natural than that the payment should then be made, and nothing more unnatural than that a provision intended for her support, and as a marriage settlement,

should be agreed to be paid and received, at the end of each week of the connection. In addition to this, we are called upon to believe, that they intended to make a contract, for the benefit of the woman, which might be literally executed, without her ever receiving more than one dollar therefor. By the construction claimed, the first one dollar paid would become the husband's; and then each weekly payment might be made, leaving the parties, at the end of twenty years, neither richer nor poorer, than they were, at the end of the first week.

The question was asked, suppose the husband had actually paid her the one dollar per week during the coverture, could she then sue upon the contract? If the appellees are right in the construction they give to this contract, the money so paid would remain the money of the husband, as before, and the wife become a mere depositary of it. But if we adopt the other construction, the inducement held out in the contract is fulfilled; a provision is made for the party, at the termination of the union, proportional to the length of the connection; and this, by the rule prescribed in the contract. A majority of the court are of opinion, that this construction is entirely consistent with the language used, and may fairly be said to carry into effect the intent of the parties; and that this construction should be adopted, rather than one which makes the contract, at least at law, entirely worthless.

But, however this contract ought to be treated at law, we are all satisfied, that a court of equity will enforce it. For courts of equity, in furtherance of the manifest intentions and objects of parties, will carry into effect contracts of this character, though they might be avoided at law: 2 Story's Eq. 599, sec. 1370. Thus, where a woman, who owned lands, agreed with her intended husband, that, upon her marriage, she would convey said lands to him, in fee, and gave to him a bond to that effect, with condition, that she should, in case the marriage took effect, convey all her lands to him; the marriage took effect; and the heirs of the husband brought a bill to carry the contract into effect; the wife claimed, that the bond was extinguished by the marriage; but the chancellor held, that the impropriety of the security, or the inaccurate manner of wording the bond, was not material; that this agreement, being for a valuable consideration, should be executed in equity. He adds, that it is unreasonable, that the intermarriage, upon which alone the bond was to take effect, should itself be a destruction of the bond: *Cannel v. Buckle*, 2 P. Wms. 243; S. C., 2 Eq. Cas. Abr. 23,

pl. 24. And this case is recognized as law by Judge Story. It is not easy to see in what respect this case differs, in principle, from the one before us, if it is admitted that this is payable during marriage. There, as well as here, the agreement was in consideration of a proposed marriage; there, as well as here, it was to be done, only in case the marriage took effect; and, of course, was to be done when that event happened; that is, during the marriage. If it was unreasonable in that case, that the intermarriage, upon which alone the bond was to take effect, should be a destruction of the bond given by the wife, it surely is not less unreasonable, that a writing, given by the husband, to induce this marriage, should be nullified, by the marriage itself. We think, therefore, we are on sure ground, when we say, a court of equity can give relief.

The case states, that the judge below intimated an opinion, that the sum left the widow, by the will, might be deducted from the sum to be allowed on this note. This was under the idea, that this, though in form, a debt, was, in fact, an informal agreement, by which, the deceased stipulated to provide for his wife, at the rate there mentioned; and if he had done this by will, and she elected to receive it, a court of equity would not permit her to claim both, but would consider it as a fulfillment of the stipulation in this writing. But, as the appellant has expressly agreed to accept what is given by the will, as payment, so far as it can be available, the court give no opinion upon this part of the case, but advise the superior court to disaffirm the decree of probate.

In this opinion, CHURCH, STORRS, and HINMAN, JJ., fully concurred.

WAITE, J., was of opinion, that upon a fair construction of the contract, the wife was to receive the one dollar a week, for her personal benefit, during the coverture: that there was nothing in the agreement, indicating an intention that it was to be for her support, during her widowhood, if she survived him, or for the benefit of her legal representatives, in the event of his surviving her. And with respect to such representatives, the case showed nothing which would lead to an inference, that she wished to provide for them.

Decree of probate disaffirmed.

CITED in *Riley v. Riley*, 25 Conn. 159, to the point that an antenuptial contract between husband and wife, to be performed after the coverture ceases, may be enforced at law; and in *Hotchkiss v. Barnes*, 34 Id. 35, and in

Collins v. Driecoll, Id. 48, to the point that where there is a latent ambiguity in a contract, extrinsic circumstances may be shown, in order to ascertain what construction the parties intended the instrument to have; and in *Hunt v. Danforth*, 2 Curt. 606, to the point that in Connecticut the commissioners of insolvent estates have the powers of courts of equity as well as of courts of law.

ELTON v. JOHNSON.

[16 CONNECTICUT, 253.]

ALLEGATION IN DECLARATION THAT CONSIDERATION FOR GUARANTY to pay an overdue promissory note twelve months from the date of the guaranty, was an agreement to forbear for a reasonable time, is sustained by proof that the agreement was to forbear for some time, without naming any specific time. The legal construction of such an agreement is, that the forbearance should be for a reasonable time,

ASSUMPSIT. The plaintiff held the overdue note of Jones & Tomlinson, and the defendant, under the circumstances stated in the opinion, indorsed thereon the following: "I guarantee the payment of this note twelve months from this time. January 27, 1840. John D. Johnson." There was judgment for the plaintiff for the amount of the note, with interest, and the defendant moved for a new trial. The other facts are stated in the opinion.

Church and Blackman, in support of the motion.

Curtiss and Seymour, contra.

STORRS, J. The question in this case is, whether the evidence of Jones, in connection with the note and guaranty produced on the trial, conduced to prove the defendant's agreement, as stated in either of the two last counts of the declaration. The consideration, as stated in the fourth count, is the plaintiff's promise of forbearance to collect said note of the makers, for twelve months from the date of said guaranty; and that stated in the fifth count, is the plaintiff's promise of forbearance for a reasonable time from the date of said guaranty. That forbearance for some time, was the consideration of the defendant's promise, admits of no doubt, from the testimony of Jones. That testimony certainly does not tend to show, that entire forbearance which would amount to a relinquishment or discharge of the liability of the makers, was contemplated by the parties: it is obvious, that security only was sought on the one part, and forbearance only on the other. Nor does it furnish a fair infer-

ence that the forbearance was to be merely at the option or pleasure of the plaintiff. Nothing of this kind was mentioned, or alluded to, in the conversation to which the witness testifies; and it would be opposed to the whole drift of the negotiation between the parties and the object they had in view. The agreement, therefore, must have been for forbearance, either for some fixed and definite time, or for what should be a reasonable time. Which of these was the case, the witness does not undertake or profess to be able explicitly to state. The import of his testimony is, that in the interview, at which he was present, between the plaintiff, the defendant, and the makers of the note, after the makers had offered, and the plaintiff had consented to accept the defendant as security for the note, a negotiation commenced between the plaintiff and defendant, on the subject of the time during which the collection of it from the makers should be postponed; that the plaintiff proposed a shorter time than the defendant acceded to; that there was further conversation on the subject, not recollected by the witness; and that it resulted in the guaranty being given by the defendant, and accepted by the plaintiff.

The witness further stated, that he had no recollection of any agreement to wait any specific time, but inferred from the circumstance that the guaranty was to continue a year, that the makers of the note were to be relieved for that time, although he could not testify to any such agreement. Disregarding his inference as being merely his opinion and reasoning on the subject, this testimony clearly conduces to prove, that the plaintiff agreed to forbear for some time; and that such forbearance was the consideration of the defendant's guaranty; but that there was no agreement to wait any specified time. The legal construction of such an agreement would be, that the forbearance should be for a reasonable time; and we think that the most rational inference from the testimony in question, is the one which appears to have been drawn by the judge below, that no fixed time was ultimately agreed on, during which the plaintiff should indulge the makers of the note; but that the understanding was, that it should be such as would be reasonable, under all the circumstances of the case. The last count, therefore, was supported by the evidence.

The objection to the evidence offered by the plaintiff for the purpose of proving notice to the defendant of the non-payment of the note, is withdrawn, and need not therefore be considered. A new trial ought not to be granted.

In this opinion the other judges concurred, except HINMAN, J., who gave no opinion.

New trial not to be granted.

CITED in *Redfield v. Haight*, 27 Conn. 37, to the point that a guaranty is a contract that some particular thing shall be done, whether it is to be done by one person or another, and whether there be a prior or principal contractor or not.

CALKINS v. LOCKWOOD.

[16 CONNECTICUT, 276.]

WHERE ONE AGREES TO LEND HIS CREDIT TO ANOTHER to enable the latter to manufacture goods, stipulating that he shall have the right to take, at his pleasure, the articles so manufactured and sell them and apply the proceeds to the extinction of the debt, such contract will be held valid as between the parties themselves, and also as to the creditors of the manufacturer, where possession is taken under the contract before the creditors attach.

TROVER for a quantity of pig iron. Both parties claimed title to the iron under Nathaniel E. Bradley, the manufacturer, and undisputed owner thereof up to February 16, 1843, when Barnabas Payne took possession of it by virtue of a contract between him and Bradley. The substance of this contract is stated in the opinion. The defendants claimed title by virtue of several writs of attachment against Bradley, levied by the defendant Lockwood, as a deputy sheriff, in favor of the other defendants and other creditors of Bradley. The court instructed the jury that upon the facts admitted by the parties Payne had not acquired such a title to the iron or such a lien upon it, when it was attached, as to enable him to hold it against them, and the jury found for the defendants. The plaintiff moved for a new trial.

Church and Seymour, in support of the motion.

T. Smith and Sterling, contra.

WILLIAMS, C. J. The defendants claimed under attachments against one Nathaniel E. Bradley; and the only question finally made, was, whether the transfer of the property by Bradley to Payne, with the possession taken by Payne under it, which was prior to the attachments, was valid, and should prevail against the attaching creditors of Bradley. The defendants claimed, in the first place, that the conveyance of the property was not

valid as between the parties themselves; and secondly, that it was void as against the creditors of Bradley.

In support of the first proposition, it was claimed, that this property was not in existence when Bradley undertook to convey it to Payne; Bradley having hired the premises of Payne, and Payne having agreed to become surety for him for the coal, which he had purchased, or might purchase, to carry on the manufacture of iron, in which he was engaged; and that the coal should be the property of Payne, and he should have a lien on all the iron made, or to be made, at the furnace, and all the stock and personal property that Bradley might have in and about the furnace, until said coal should be paid for, and said Payne indemnified; Payne to have a right to control and direct the sale of the iron, and apply the avails to his liabilities, and account for the balance: his lien and right to control the property, to exist at all times. Upon these facts the defendants claimed, that as the iron was not in existence when the contract was made, no title passed, by virtue of the contract itself; that if it was a pledge, the general property remained in the owner; that no lien could be given, except possession was also given.

It is true, that at common law, by an executed contract, no title would pass to property, in which the owner had not, what was called, an actual or potential interest; and it is said, if a man conveys all the grass upon a piece of land, cut next season, which land he shall purchase of A. B., this will convey no title to the grass, even if he purchase of A. B.; because, at the time, he had neither an actual nor potential interest. But if he conveys all the grass which next season may grow upon lands which he then owned, this is good; because he had a potential, if not an actual, interest in such grass: *Grantham v. Hawley*, Hob. 132; Pow. Con. 152. But it does not seem necessary to examine these nice distinctions for this case. This is nothing more than an agreement, in which, for a valuable consideration, Bradley agrees with Payne, that if he will become surety for him, to aid him in carrying on the manufacture of iron, the iron shall be pledged to him to indemnify him for his guaranty, and he shall have right to take possession thereof, at his pleasure, for that purpose. In other words, he agrees with Payne, that if he will, by his credit, aid him to capital to carry on his manufacture, he, Payne, shall have the right to take, at his pleasure, the article so manufactured, and sell and apply it to the extinction of such debt.

Is there any principle of law, which, as between the parties,

makes such a contract void? Among the cases cited by the defendants, no one goes this length. To create a pledge as a lien, possession may indeed be necessary; but when possession is actually taken, by virtue of a contract, it would be strange indeed to say, that the party who made that contract could object to the possession so obtained. The case comes then to this. Payne has taken possession of property, by the consent of the owner, to indemnify himself for the debt of the owner, for which he was surety; and the owner would now repudiate the contract, because, at the time, he could not give possession, the property not then being in existence. But the contract was made in contemplation of the fact, and with reference to it, and to be completed when circumstances admitted of its completion, and in fact was completed, the moment the iron was manufactured, and possession taken of it. Possession taken by Payne under an agreement from Bradley that he might take such possession, amounts to a delivery by Bradley, and ought to have the same effect; and we see no more reason to say, that Bradley could set up this defense, that if he had sold a horse, and authorized the purchaser to go and take possession of him, in an adjoining town. In each case, something is to be done; and when that act is done, in both cases, the contract is complete. The case of *Macomber v. Parker*, 18 Pick. 175, is very analogous to this. There H. and L. leased to E. a brick-yard; E. to make bricks, and pay H. and L. for the clay; H. and L. to buy the wood and sell the bricks, and to divide the profits, with power to retain the bricks in possession, to the amount of all the money they might advance to E. H. and L. assign this contract to the plaintiffs, with the assent of E., who was to act as his agent, and the plaintiffs to make advances, as H. and L. were to do. The plaintiffs took possession, and gave the charge of the yard to E., with directions to sell the bricks, and deposit the avails to the plaintiffs' order. The bricks were afterwards attached as the property of E.; and it was held, that the plaintiffs' lien must prevail. The court say, it was an agreement for the pledging of the bricks, as they should be made. It is true, that where the property is to be thereafter acquired, it is not strictly and technically a pledge; it is rather a hypothecation; but when the title is acquired in future, the right of the pledge attaches immediately upon it. In *Mont. on Lien*, 36, n. 6, it is said, that it is usual to speak of lien by contract, though that is more in the nature of an agreement for a pledge. Taken either way, however, the question always is, whether there be a right

to detain the goods till a given demand shall be satisfied. He cites *Gladstone v. Birley*, 2 Meriv. 404; *Macomber v. Parker*, 14 Pick. 499. The court add, every brick, as it was formed, may well be considered as delivered to the plaintiffs, in part execution of the contract. That case differs, in no respect, in principle, from the present; and, if law, must control it.

Judge Story, in his treatise on bailment, p. 293, sec. 290, 294, cites this case with approbation; and in his text declares, that of things not in existence, there can not be a technical pledge, at common law; yet there may be a hypothetical contract, which will attach, as a lien or pledge, to them, as soon as they come into existence; though he says, it is not easy to reconcile this with *Bonsey v. Amee*, 8 Pick. 236. It is true, that the authorities in the case from Massachusetts, are principally from the civil law; but unless they are opposed by authority from the common law, they are not to be rejected. Judge Story, too, in a former edition of his treatise, seems to have entertained doubts on the subject. The citation is from the third edition. The learned judge says, he has added new matter, as more thorough researches into foreign and domestic treatises, as well as a diligent review of the recent adjudications in England and America, have enabled him to collect, and illustrate the subject. When we recollect, that one great principle of the common law, is, to carry the contracts of parties into effect according to their intent, we do not discern why the principle laid down in the case from Massachusetts, is not correct, or that it depends upon any peculiarity of the civil law. We have, therefore, no hesitation in saying, that the contract was good as between the parties.

But the great question in this case, is, whether the contract is good as against the creditors of the grantor. It is said, the property was not in existence, when this contract was made. It is true, that the contract, on both parts, was made in relation to future events. The one was to become guarantor for the other; and the other promised to secure him therefor, by means of the very property, which was the fruit of said guaranty. We see nothing improper or unjust in this. It is said, that possession was essential to accompany the contract, whether it was a sale or a pledge. The general principle upon this subject is not denied, as stated by the court in *Osborne v. Tuller*, 14 Conn. 529. And so too it is the essence of the contract of pledge, that there should be an actual delivery: Story on Bail. 298, sec. 297; though in case of an hypothecation, no such delivery is necessary. Id. 300, secs. 297, 298. But as, in this case, possession

was taken before the attachment, it does not seem necessary to settle the question what would have been the condition of the parties, before possession was taken.

Suppose Bradley, to induce Payne to become his guarantor, had stipulated with him, to secure him, at any time, by this very property, and had done it and delivered possession; could another creditor complain, because this was done under a contract to do the same, by which no possession was given? The answer would be, until possession taken, you might have secured your debt; and if it is held, even under this contract, that possession must be taken, the same answer may be given to other creditors: possession was taken under the contract, before you made any attempt to secure yourself. The owner had given Payne a right to take possession. That right may not have been complete until possession taken, or delivery had; and then it seems to us, the right of Payne became perfect and complete; and we have seen no case among those we have examined, that contradicts this principle.

It is further said, that it is an attempt to cover all the property of the grantor. The contract does not show that. It is indeed, all the property in and about the furnace. Whether that is all, or even a large portion, of the property of the grantor, the court can not judicially know; nor is it stated to be claimed, that this is the only property of Bradley. But if it was so, this was only one among other facts to be left to the jury, for them to pass upon, relative to the fraud. Again, it is said, that the consideration is debts not then existing. On this subject, it has been often holden, in other states, that whether the engagement for which the surety was given, was a future debt, or a then existing debt, it was equally valid: *Badlam v. Tucker*, 1 Pick. 389 [11 Am. Dec. 202]; *Holbrook v. Baker*, 5 Greenl. 309 [17 Am. Dec. 236]; *De Wolf v. Harris*, 4 Mason, 515; *Conard v. Atlantic Ins. Co.*, 1 Pet. 448; Story on Bail. 303, sec. 300. In *Hendricks v. Robinson*, Chancellor Kent says, nor is an assignment, if honestly made, bad, though made to secure against future as well as present responsibilities. It is altogether a question of intention; and if that be free from fraud, the assignment is not void within the statute: *Hendricks v. Robinson*, 2 Johns. Ch. 308; *Lyle v. Ducomb*, 5 Binn. 585. And whatever doubt may have existed in this court, we think it has been entirely removed, by the case of *Hubbard v. Savage*, 8 Conn. 215. Of course, it must follow, that the fact of the debts not being due, could not affect the right of Payne. The

contract was a contract to indemnify him against loss, by something more substantial than the mere agreement of the party. It was therefore coupled with an agreement, that he might enter and take possession of this security. Such a contract may indeed give a better opportunity to one creditor than another; but so does every contract by which a creditor is preferred to another creditor.

It is said, that the holding this contract good, will be to destroy the salutary rule as to possession. The time and circumstances under which possession is taken, may be very proper (as are the other objections made by the defendants in the present case) for the consideration of the triers, when considering whether this contract is fraudulent or not. But no one of them, nor all of them together, will authorize the court, as matter of law, to say, this contract, upon its face, is void. It is true, that contracts of this kind may be made a cover for fraud; and so of many others confessedly good. The same argument was used in the late case of *Forbes v. Marsh*, 15 Conn. 384; but without success. This case differs entirely from that class of cases, where the instrument itself discloses a trust for the grantor. Nothing of that kind appears upon this instrument. We think, therefore, that a new trial must be granted.

In this opinion, CHURCH, STORRS, and HINMAN, JJ., concurred.

CITED in *Meade v. Smith*, 16 Conn. 360, to the point that it would be a most injurious restriction on the right of alienation to set aside or refuse to enforce an honest agreement simply because a contract of sale may sometimes be used by the wicked as a mere cover for fraud and knavery; and in *Stinson v. Clark*, 6 Allen, 341, to the point, that where parties to a sale of iron met at the place where it was, and the seller said to the buyer, "I deliver to you this iron at that price," the delivery was good, and the sale valid.

BEARDSLEY v. SMITH.

[16 CONN. 360, 368.]

EXEMPTION ISSUED UPON JUDGMENT AGAINST MUNICIPAL CORPORATION may be levied upon the private property of an individual member of such corporation.

TRESPASS *de bonis asportatis*. The defendant justified the taking by a special plea in bar, to which plea there was a general demurrer. The case was reserved for the consideration of this court as to what judgment ought to be rendered on the demurrer. The other facts are stated in the opinion.

J. A. Spencer and J. W. Huntington, in support of the demurrer.

Hawley and Dutton, contra.

CHURCH, J. In the late case of *The City of Bridgeport v. The Housatonic Railroad Company*, 15 Conn. 475, this court decided, that the bonds and scrip issued by that city to the railroad company, under the legislative resolution of 1838, were of full and perfect obligation. Upon several of these bonds and coupons suits have been instituted, judgments rendered, and executions issued against the city. With one of these executions, this defendant, as deputy sheriff, made legal demand of the clerk, treasurer, and mayor, and of several individuals, citizens of Bridgeport, and among others, of this plaintiff, for moneys and goods to satisfy the same, and upon refusal, he levied the writ of execution upon the goods of the plaintiff, in the manner stated by him in his return appended to his plea.

The demurrer to the defendant's plea of justification, presents to us the question, whether this execution against the city could be legally levied upon and collected from the private property of the plaintiff, who, when it was levied, was a freeman and inhabitant of said city? These bonds, imposing a legal obligation upon the corporation, and constituting a valid debt against it, may be enforced and collected, in the same manner as any other debt of the city may be contracted, for ordinary city purposes; unless the claim of the plaintiff can be sustained, that the resolution of the general assembly, under which these bonds have been issued, is unconstitutional, so far as it professes to give authority to levy an execution against the city, upon the individual property of a citizen. The plaintiff urges the unconstitutionality of that resolve, upon the ground, that it authorizes the taking of private property for public use, without compensation; or the seizure of the property of one person for the benefit of another, without his consent. And it must be conceded, that if such be the purpose or the effect of the resolve in question, it is unconstitutional and void.

We do not go into the question, whether, without the aid of this resolution of 1838, the defendant could have justified his levy upon the plaintiff's property, unless it be incidentally involved in this discussion. In the decision of the principal case before referred to, we intentionally left the question now raised unembarrassed, so far as the subjects of decision there were independent of the question here. We know, that the relation in

which the members of municipal corporations in this state have been supposed to stand, in respect to the corporation itself, as well as to its creditors, has elsewhere been considered in some respects peculiar. We have treated them, for some purposes, as parties to corporate proceedings, and their individuality has not been considered as merged in their corporate connection. Though corporators, they have been holden to be parties to suits by or against the corporation, and individually liable for its debts. Heretofore, this has not been doubted as to the inhabitants of towns, located ecclesiastical societies, and school districts.

From a recurrence to the history of the law on this subject, we are persuaded that the principle and usage here recognized and followed, in regard to the liability of the inhabitants of towns and other communities, were very early adopted by our ancestors. And whether they were considered as a part of the common law of England, or originated here as necessary to our state of society, it is not very material to inquire. We think, however, that the principle is not of domestic origin, but to some extent, was operative and applied in the mother country, especially in cases where a statute fixed a liability upon a municipality which had no corporate funds. The same reasons and necessity for the application of such a principle and practice, existed in both countries. Such corporations are of a public and political character: they exercise a portion of the governing power of the state. Statutes impose upon them important public duties. In the performance of these, they must contract debts and liabilities, which can only be discharged, by a resort to individuals, either by taxation or execution. Taxation, in most cases, can only be the result of the voluntary action of the corporation, dependent upon the contingent will of a majority of the corporators, and upon their tardy and uncertain action. It affords no security to creditors, because they have no power over it. Such reasons as these probably operated with our ancestors, in adopting the more efficient and certain remedy, which has been resorted to, in the present case, and which they had seen, to some extent, in operation, in the country whose laws were their inheritance.

The plaintiff would apply to these municipal or *quasi* corporations, the close principles applicable to private corporations. But inasmuch as they are not, strictly speaking, corporations, but only municipal bodies, without pecuniary funds, it will not do to apply to them literally, and in all cases, the law of cor-

porations: *Fourth School District v. Wood*, 13 Mass. 192. The individual liability of the members of quasi corporations, though not expressly adjudged, was very distinctly recognized, in the case of *Russell v. The Men of Devon*, 2 T. R. 667. It was alluded to, as a known principle, in the case of *The Attorney General v. The City of Exeter*, 2 Russ. 45, applicable as well to cities as to hundreds and parishes. That the rated inhabitants of an English parish are considered as the real parties to suits against the parish, is now supposed to be well settled; and so it was decided, in the cases of *The King v. The Inhabitants of Woburn*, 10 East, 395, and *The King v. The Inhabitants of Hardwick*, 11 Id. 577. And in support of this principle, reference was made to the form of the proceedings; as that they are entitled "against the inhabitants," etc.

In the state of Massachusetts, from whose early institutions we have borrowed many valuable specimens, the individual responsibility of the inhabitants of towns for town debts, has long been established. Distinguished counsel, in the case of *The Merchants' Bank v. Cook*, 4 Pick. 405, referring to municipal bodies, say, "for a century past, the practical construction of the bar has been, that in an action by or against a corporation, a member of the corporation is a party to the suit." In several other cases in that state, the same principle is repeated. In the case of *Riddle v. The Proprietors of the Locks and Canals on Merrimack River*, Parsons, C. J., in an allusion to this private responsibility of corporators, remarks, "and the sound reason is, that having no corporate fund and no legal means of obtaining one, each corporator is liable to satisfy any judgment obtained against the corporation:" 7 Mass. 187 [5 Am. Dec. 35]. So in *Brewer v. The Inhabitants of New Gloucester*, 14 Id. 216, the court say, "as the law provides, that when judgment is recovered against the inhabitants of a town, execution may be levied upon the property of any inhabitant, each inhabitant must be considered as a party." In the case before referred to of *The Merchants' Bank v. Cook*, Parker, C. J., expresses the opinion of the court upon this point, thus: "Towns, parishes, precincts, etc., are but a collection of individuals, with certain corporate powers for political and civil purposes, without any corporate funds from which a judgment can be satisfied; but each member of the community is liable in his person and estate, to the execution which may issue against the body: each individual, therefore, may be well thought to be a party to a suit brought against them, by their collective name. In regard to banks, turnpike, and other

corporations, the case is different." The counsel concerned in the case of *Mowbr v. Leicester*, 9 Mass. 247 [6 Am. Dec. 63], without contradiction, speak of this practice of subjecting individuals, as one of daily occurrence. The law on this subject was very much considered in the case of *Chase v. The Merrimack Bank*, 19 Pick. 564 [31 Am. Dec. 163], and was applied and enforced against the members of a territorial parish. "The question is," say the court, "whether on an execution against a town or parish, the body or estate of any inhabitant may be lawfully taken to satisfy it? This question seems to have been settled in the affirmative, by a series of decisions, and ought no longer to be considered as an open question."

The state of Maine when separated from Massachusetts, retained most of its laws and usages, as they had been recognized in the parent state, and among others, the one in question. In *Adams v. Wiscasset Bank*, 1 Greenl. 361 [10 Am. Dec. 88], Mallen, C. J., says: "It is well known, that all judgments against quasi corporations may be satisfied out of the property of any individual inhabitant." The courts of this state, from a time beyond the memory of any living lawyer, have sanctioned and carried out this usage, as one of common law obligation: and it has been applied, not to towns only, but also, by legal analogy, to territorial ecclesiastical societies and school districts. The forms of our process against these communities have always corresponded with this view of the law. The writs have issued against the inhabitants of towns, societies, and districts, as parties. As early in the history of our jurisprudence as 1705, a statute was enacted, authorizing communities, such as towns, societies, etc., to prosecute and defend suits, and for this purpose, to appear, either by themselves, agents, or attorneys. If the inhabitants were not then considered as parties individually, and liable to the consequences of judgments against such communities as parties, there would have been a glaring impropriety in permitting them to appear and defend by themselves; but if parties, such a right was necessary and indispensable. Of course, this privilege has been, and may be exercised: 1 Sw. Syst. 227.

Our statute providing for the collection of taxes, enacts that the treasurer of the state shall direct his warrant to the collectors of the state tax in the several towns. If neither this, nor the further proceedings against the collectors and the selectmen authorized by the statute, shall enforce the collection of the tax, the law directs, that then, the treasurer shall issue his execution against the inhabitants of such town. Such an execution

may be levied upon the estate of the inhabitants; and this provision of the law was not considered as introducing a new principle, or enforcing a novel remedy, but as being only in conformity with the well-known usage in other cases. The levy of an execution under this statute, produced the case of *Beers v. Botsford et al.*, 3 Day, 159. There, the execution, which had been issued against the town of Newtown, by the treasurer of the state, had been levied upon the property of the plaintiff, an inhabitant of that town, and he had thus been compelled to pay the balance of a state tax due from the town. He sued the town of Newtown for the recovery of the money so paid by him. The most distinguished professional gentlemen in the state were engaged as counsel in that case; and it did not occur, either to them or to the court, that the plaintiff's property had been taken without right: on the contrary, the case proceeded throughout upon the conceded principle of our common law, that the levy was properly made upon the estate of the plaintiff. And without this, the plaintiff could not have recovered of the town, but must have resorted to his action against the officer, for his illegal and void levy.

In *Fuller v. Hampton*, 5 Conn. 417, Peters, J., remarked, that if costs are recovered against a town, the writ of execution to collect them, must have been issued against the property of the inhabitants of the town; and this is the invariable practice. The case of *Atwater v. Woodbridge*, 6 Conn. 223 [16 Am. Dec. 46], also grew out of this ancient usage. The ecclesiastical society of Bethany had been taxed, by the town of Woodbridge, for its moneys at interest; and the warrant for the collection of the tax had been levied upon the property of the plaintiff; and the tax had thus been collected of him, who was an inhabitant of the located society of Bethany. Brainard, J., who drew up the opinion of the court, referring to this proceeding, said: "This practice with regard to towns, has prevailed in New England, so far as I have been able to investigate the subject, from an early period—from its first settlement—a practice brought by our forefathers from England, which had there obtained incorporations similar to the towns incorporated in New England." It will here be seen, that the principle is considered as applicable to territorial societies as to towns, because the object to be obtained was the same in both—"that the town or society should be brought to a sense of duty, and make provision for payment and indemnity"—a very good reason, and very applicable to the case we are considering.

The law on this subject was more distinctly brought out, and considered by this court, in the late case of *McLoud v. Selby*, 10 Conn. 390, in which this well-known practice, as it had been applied to towns and ecclesiastical societies, was extended and sanctioned as to school districts—else “it would be breaking in upon the analogies of the law.” “They are communities for different purposes, but essentially of the same character.” And no doubt can remain, since the decision of this case, but that the real principle of all the cases on this subject, has been, and is, that the inhabitants of *quasi* corporations are parties individually, as well as in their corporate capacities, to all actions, in which the corporation is a party. And to the same effect is the language of the elementary writers: 2 Kent’s Com. 221; Ang. & Ames on Corp. 374; 1 Sw. Dig. 72, 794; 5 Dane’s Abr. 158. With this evidence of the law before us, until this time uncontradicted and undoubted, what else can we say, than to declare, that by the law of this state, each inhabitant of a town is a party to all suits prosecuted against it for the recovery of its debts; that each is liable to pay them; and that executions for their collection may be levied upon the private estate of such inhabitants? That the same remedy may be pursued for the collection of the debts of cities, by reason of the analogies of the law, we can not doubt.

The legislature, undoubtedly, when they passed the resolve of 1838, had the law in view, as we have now declared it; and referred to it as being the law of the state, when they said, “and said installments and the notes, certificates, scrip, or other securities, which have been, or may be, issued as aforesaid, shall be obligatory on said city, to all intents and purposes, and may be enforced and collected, in the same manner, and to the same extent, that debts lawfully contracted by towns in this state, are enforced, under the existing laws of the state.” Does this resolve authorize the taking of private property for public use, without compensation; or does it authorize the seizure of the property of one person for the benefit of another; and is it, for either of these causes, unconstitutional as the plaintiff claims?

To sustain this objection to the validity of the resolve the plaintiff must be able to show the entire system which we have been discussing, to be unconstitutional in its operation upon the inhabitants of towns, societies, and school districts; and that what has so long been considered as undisputed law, is not law; and that our jurists have been, from the beginning, deceived, as to the extent and application of a plain constitutional

provision. We can not concede this. The resolution under consideration does not profess to confer greater powers upon the creditors of the city of Bridgeport, than the creditors of towns have always exercised. It subjects the inhabitants of cities and towns to the same law. Nearly every case on this subject, to which we have referred in this state, Massachusetts and Maine, has been decided, since the adoption of the constitutions of these states, securing the rights of property from public and private invasion, and while the constitutional privileges of the citizens have been carefully noticed and protected. Besides, we understand the plaintiff, upon this argument, to admit, that under the taxing power of the city, his property could be legally taken and appropriated for the payment of these debts. The objection, then, is not so much that his estate has been taken for public use, as to the manner in which this has been done. But the operation of the resolution of 1838, and of the law as it has always been received in this state, as we have seen, is not to take the property of an individual for public use, but to take it for the satisfaction of a judgment and execution against himself to which he is a party and for which he, with the rest of the inhabitants of the city, is, in his own person or estate, responsible. There is no constitutional infirmity, therefore, in the resolve of assembly, under which these bonds were issued, nor in the ancient law and usage of the state, which gave rise to it.

We are not insensible, that sometimes it is supposed, there is a power in courts to mold and fashion the law to suit some interested notions of justice, and even to dispense with its objections, in cases supposed to bear hard upon individuals. We know of no such power. The law as it is—the law as we find it—must be our only rule of decision, leaving to the legislature the exclusive exercise of the power of repeal or modification. But if we had any such authority, we are not convinced, that this case furnishes a proper occasion to exert it. The city of Bridgeport, with great deliberation and unanimity, and under the sanction of the general assembly, has contracted a debt. The securities issued by the city, have been purchased, by *bona fide* holders, with its assent, and upon the faith of the city and the laws. No funds, either by taxation or otherwise, have been provided for payment. A right without a remedy, is not an admitted principle. We know of no other practical remedy, but the one to which this plaintiff has resorted; and if this shall produce an equalized taxation of the inhabitants of the corpora-

tion, it will probably have the effect which our ancestors intended should be produced by it.

We ought perhaps, in conclusion, to remark, that some of our rules of evidence may well enough be thought to be at variance with the leading doctrine advanced in this opinion. For although, for the purposes here suggested, we consider the inhabitants of *quasi* corporations as parties to suits against the corporation, yet we do not receive their confessions or admissions in evidence against either the corporation or its other members; and for reasons of necessity or policy, we admit such inhabitants as witnesses in behalf of the corporation. For the reasons here suggested, we advise the superior court, that the defendant's plea in bar is sufficient, and that judgment thereon be rendered in his favor.

In this opinion the other judges concurred.

Plea sufficient.

CITED in *Union v. Crawford*, 19 Conn. 333, and in *Second Ecc. Soc. of Portland v. First Ecc. Soc. of Portland*, 23 Id. 279, to the point that the inhabitants of towns and other *quasi* corporations are parties, individually as well as in their corporate capacity, to all actions in which the corporations are parties; and in *Kinne v. New Haven*, 32 Id. 215, to the point that the confessions and admissions of the inhabitants of a town are never receivable in evidence in an action against it.

INDIVIDUAL ESTATE OF INHABITANTS OF TOWN IS LIABLE to be taken in execution for the satisfaction of a corporate debt: *Jewett v. Thames Bank*, 16 Conn. 215, citing the principal case. See also *McLoud v. Selby*, 27 Am. Dec. 689, note 695. But on this point the doctrine of the principal case is disapproved in *Emery v. Gilman*, 10 Cal. 408.

CROUCH v. CARRIER.

[16 CONNECOTICUT, 505.]

WHERE VENDOR OF PERSONAL PROPERTY RETAINS POSSESSION AND Use thereof after a sale, the same as he did before, the sale will be treated as fraudulent and void as to his creditors.

TRESPASS for the taking of a yoke of oxen. The jury found for the plaintiff, and the defendants moved for a new trial. The other facts are sufficiently stated in the opinion.

Strong, in support of the motion.

Foster, *contra*.

CHURCH, J. In considering this motion, we shall confine ourselves to that part of the plaintiff's case, which was proved by his own witness, Henry Holdridge, and not disputed by the de-

fendants; and thus avoid any inquiry into the weight of conflicting evidence. It is to be presumed, that this witness stated the facts as favorably for the plaintiff as truth would justify. The oxen in dispute had been purchased of the plaintiff, by Henry M. Holdridge, and placed upon the farm in the joint occupancy of himself and his father, the witness, and, together with other cattle there, had been used in the cultivation of the farm, as well as for other purposes, by the witness, in the absence of his son, who was temporarily engaged in another town. There was no actual delivery of the cattle to the plaintiff, at the time of the sale, nor at any other time; but by an agreement between the parties, they remained with Henry Holdridge, to be used on the farm as before, or for his personal accommodation. They were kept and used on the farm as formerly, and were there, when they were attached by the defendants, to secure a debt against Henry M. Holdridge. Although Henry Holdridge, the father, was an agent for his son in making the sale, yet neither the use nor the possession of the oxen was changed; everything remained as before; nor was any legally sufficient reason given nor pretended, why they continued under the same control and management.

The jury, in opposition to the explicit instructions of the court, have attempted to sustain this pretended sale, upon what they probably supposed was the *bona fides* of the matter, without regard to the continued possession and apparent ownership of the property, and without any other explanation or excuse for such possession, than the personal accommodation of Henry Holdridge, the agent. This is an insufficient explanation; and the verdict is in certain opposition to the legal operation of the facts which the plaintiff himself claims to be true, and which are proved by his own witness; and it can not be sustained, without an abandonment of well-settled principles, as recognized in all our cases, and especially in the late cases of *Swift v. Thompson*, 9 Conn. 63 [21 Am. Dec. 718]; *Mills v. Camp*, 14 Id. 219 [36 Am. Dec. 488]; *Carter v. Watkins*, Id. 240, 243, 244; *Osborne v. Tuller*, Id. 530.

We think a new trial ought to be granted.

In this opinion the other judges concurred.

New trial to be granted.

SALE OF CHATTEL WITHOUT ACTUAL, VISIBLE, AND CONTINUED CHANGE of possession, is void as to the creditors of the vendor: *Potter v. Payne*, 21 Conn. 377; *Norton v. Doolittle*, 32 Id. 410, both citing the principal case; *Lewis v. Love*, 38 Am. Dec. 161, note 164, where other cases are collected.

MARCY v. CRAWFORD.

[16 CONNEBOTICUT, 542.]

PROMISE TO INDEMNIFY ANOTHER FOR DOING A PARTICULAR ACT is an original undertaking, and not within the statute of frauds.

AGREEMENT TO INDEMNIFY ANOTHER FOR COMMISSION OF TRESPASS is not illegal, where the act is not, at the date of the agreement, known to be a trespass.

WHERE ONE AGREES TO PAY ONE HALF OF ANY JUDGMENT that may be rendered against another for doing a particular act, no notice need be given by the latter to the former before bringing suit to recover under such agreement, of the fact that such a judgment has been rendered against him.

ASSUMPSIT, brought originally in a justice's court, from which an appeal was taken to the county court, in which court there was a verdict for the plaintiff, upon which judgment was entered. The defendant then brought a writ of error in the superior court. The superior court affirmed the judgment of the county court, and thereupon the original defendant, by motion in error, brought the record before this court for revision. The other facts appear from the opinion.

Strong, for the plaintiff in error.

Stoddard, for the defendant in error.

HINMAN, J. The fourth and last cause assigned for error, has not been insisted upon in the argument; and the only notice it is necessary to take of it, is, to say, that the record shows no facts from which this claim, as made in the writ of error, can arise in the case. It does not appear from the bill of exceptions, what the charge of the county court was upon this claim; nor does it appear, that the court was requested to charge the jury upon it. In the absence, then, of any evidence of this sort, the presumption is, that if the court gave any instructions to the jury upon the subject, it charged them correctly. The second cause of error assigned in the writ, may also be disposed of in a few words. The promise of the defendant to pay one half of the damages, which might be recovered against Samuel P. Crawford, for fishing in the mill-pond, and one half of the expenses of defending against such a suit as might be brought against him for such fishing, was in no sense a promise to answer for the debt or default of Samuel P. Crawford; but was an original undertaking, and of course, not within the statute of frauds and perjuries. It could not be for the debt of S. P. Crawford; for he owed none. It was not for his default; but was rather a

promise of indemnity, to a certain extent, for doing a particular act, like the promise of indemnity to an officer for taking property, which it may be doubted whether the creditor can hold.

Then as to the first error assigned, that the county court did not instruct the jury, that the promise claimed to be proved by the plaintiff, was an illegal promise, because, as the defendant insisted, it was a promise made in consideration of the commission of an illegal act. Now, there can be no doubt, that the law will not enforce a contract to commit an illegal act. A promise to commit a battery, to pull down another's house, or to commit any such willful trespass to another, is illegal and void. But, merely because an act proves to be a trespass, which was not originally supposed to be so, will not render a promise of indemnity for the commission of it, void. Promises of indemnity to officers to induce them to execute process, by taking property, where the title to it is disputed, are very common, and their legality has been often recognized: *Wright et al. v. Lord Vernet*, 8 Doug. 240; S. C., 26 Eng. Com. L. 94; *Marsh v. Gold et al.*, 2 Pick. 284; *Train v. Gold*, 5 Id. 380. And in the case of *Stone v. Hooker*, 9 Cow. 154, it was held, that a promise to indemnify against a trespass, is valid, unless it be shown that the promisee knew the act to be a trespass. And in *Avery v. Halsey*, 14 Pick. 174, where two persons were claiming title to personal property, and one of them called a third person to assist him in removing it; a promise of indemnity to the assistant was held to be valid, although the title of his employer turned out to be invalid.

The question then, is, not whether the act turns out to be a trespass, but whether the parties knew it was a trespass, and contemplated it as such; or whether they contemplated the commission of an act which they supposed they had a right to do, and did it under such claim of right. Now, it certainly is consistent with every fact stated in the bill of exceptions, that the agreement of the parties was made under a claim of right to fish in the pond; and that their object was, to lay the foundation to try their right. Nor is there any fact stated, which tends to show, that they contemplated the act of fishing as a trespass. There are not, therefore, any facts shown, which would have authorized the court in instructing the jury, that the promise claimed to be proved was illegal. But again, the instruction given to the jury shows, that the fishing must have been under a claim of right. The court say to the jury, "that if said trespass was committed under a claim made by the plaintiff and defendant of a right in them to fish in the said

mill-pond; said contract or undertaking of the defendant, as claimed by the plaintiff, was a valid and binding contract." The court do not in terms charge the jury in conformity to the defendant's claim. But the jury, under this instruction, must have found that the fishing was done under a claim of right. They must have understood from this language, that it was necessary for them to find such to have been the claims of the parties, in entering into this contract, in order to render a verdict for the plaintiff. We think, therefore, that there was no error in this part of the charge of the county court.

Another error assigned, is, that the court instructed the jury, that the plaintiff might recover, without proving previous notice to the defendant of the judgment rendered against Samuel P. Crawford, and of the expenses of defending against the suit on which said judgment was rendered. In this too, we think there was no error. The general rule on this subject, is correctly stated, by Bristol, J., in the case of *Ward v. Henry*, 5 Conn. 600 [18 Am. Dec. 119], "that if the obligation of the defendant depends on the performance of an act by the plaintiff to a third person, or by a third person to the plaintiff, the plaintiff's right of action is complete, whenever the act is done; and it is unnecessary either to allege or prove notice of the act on which the obligation is to arise. In such cases, the matter on which the defendant's obligation is to arise, is not regarded as lying more properly in the knowledge of the plaintiff than of the defendant." It has accordingly been held, that a co-surety, who has paid money, may bring an action for contribution, without alleging or proving any previous notice of the payment to the defendant, or any demand on him for his share: *Chaffee v. Jones*, 19 Pick. 260. The parties in the case under consideration, stand, in relation to each other, very like co-sureties; and we do not see, why the same principle that was applied in the case cited, should not be applied to this case.

Upon the whole, then, we think, that there was no error in the proceedings of the county court; and of course, there can be none in the judgment of the superior court affirming them.

In this opinion the other judges concurred.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS

LOUVALLE v. MENARD.

[1 GILMAN, 39.]

PROCEEDINGS FOR PARTITION OF REALTY UNDER ILLINOIS STATUTE OF 1837 are summary and *in rem*, and act only on the legal rights of the parties in dissolving the tenancy, and the equitable right of one of them to the value of improvements erected on the common land is not thereby affected.

TENANT IN COMMON CAN NOT COMPEL CO-TENANTS TO CONTRIBUTE TO IMPROVEMENTS made by him on the common land, either at law or in equity, where the improvements were not necessary as reparations of the property, nor for its preservation or joint enjoyment, as where such improvements consist of a dwelling-house erected for his own benefit.

TENANT IN COMMON HAVING ERECTED DWELLING-HOUSE on the common land is entitled, on partition, to have the portion of land on which it is erected assigned to him, if practicable, without regard to the increased value of such portion arising from the improvement; and where the land not being susceptible of division is sold in partition proceedings under the statute, the tenant in common who erected the improvement is entitled, before a division of the proceeds, to the actual increase of the price received at the sale, caused by such improvement, and may maintain a bill in equity therefor.

BILL for injunction and relief. The injunction was dissolved and the bill dismissed, and the complainants appealed. The facts appear from the opinion.

D. J. Baker, for the appellants.

W. H. Underwood and J. Gillespie, for the appellees.

By Court, **TREAT, J.** The parties to this suit were tenants in common of a tract of land, situate in Randolph county, and containing sixty-two acres, in which the present complainants, as the heirs at law of Antoine La Chapelle, had an interest of one

third. Pierre Menard, Louis La Chapelle, and Bazil La Chapelle instituted proceedings by petition, under the statute, and obtained an order for a division of the premises among the proprietors. The commissioners appointed to make the partition reported, that the land was not susceptible of division, and the court made an order for the sale thereof. The land was sold by a commissioner for eight hundred and seventy-seven dollars and fifty-two cents. Before any division of the proceeds of the sale, the complainants filed their bill in chancery, alleging that their ancestor had erected a valuable dwelling-house on the land, thereby materially enhancing its value; in consequence of which, it had sold for a much larger amount than it otherwise would have done, and praying that the value of the improvement might be allowed to them, before the proceeds should be distributed. On the bill, an injunction was obtained, restraining the commissioner from paying over the proceeds of the sale. Louis and Bazil La Chapelle and Jacob Sypher filed their answer, admitting the making of the improvement by Antoine La Chapelle, but denying either that the land was materially increased in value thereby, or that it sold for more in consequence of the improvement. There was a replication to the answer. The other defendants failed to answer the bill. Depositions were taken by the complainants, which fully sustain the material allegations of the bill, but it is difficult to ascertain, from the statements of the witnesses, the relative value of the improvement to the amount of the sale. On the hearing of the cause, the court dissolved the injunction, and dismissed the bill. The complainants prosecute an appeal, and assign that decision of the court for error.

A preliminary question is here made by the defendants, which, if tenable, disposes of the whole case. They contend, that if the complainants were in any event entitled to compensation for the improvement, they should have interposed their claim in the original proceedings in partition, and that they are now effectually concluded from asserting it in equity. A proper determination of this question requires a construction of the "act for the speedy assignment of dower, and partition of real estate," approved February 6, 1827, under which those original proceedings were had. The fourteenth section of the act provides, where two or more persons are proprietors of any real estate, that the circuit court, on application by petition, may order and direct a division of the same by metes and bounds; and shall appoint three commissioners to make the partition, who shall make report of their proceedings under their hands and seals, and

their report, if approved by the court, is required to be recorded, and is declared to be conclusive on all parties concerned. By the fifteenth section, the parties interested are to have notice of the application by summons, or by advertisement for four weeks in the nearest newspaper. By the sixteenth section, if the commissioners report, that a division can not be made without manifest prejudice to the interests of the proprietors, the court is authorized to direct a sale, and a distribution of the proceeds among the owners.

The foregoing are all the material provisions of the act applicable to this case. The mode of obtaining a division of real estate, given by this statute, was evidently intended to take the place of the common law remedy by the writ of partition. Without this statutory remedy, one tenant desiring a division of land held by several in common, could only effect his object by a bill in chancery. That remedy is generally attended with considerable expense, and frequently subject to great delay. The statute was doubtless intended to obviate these difficulties, by affording the parties an easy, cheap, and expeditious mode of obtaining partition. In this proceeding, the defendants are not, as in suits in equity, required to make discovery, or even to answer the petition under oath; and the testimony is not necessarily taken by depositions, but may be introduced *via voce* at the hearing. The proceedings are summary, and *in rem*. The court is to act on the legal estate, and not on the equities of the parties. Its only duty is to ascertain their respective legal interests in the premises, and direct a division among them accordingly. All questions concerning the rents and profits, and repairs and improvements, are to be determined by some other appropriate remedy. When the partition is consummated by the approval of the report of the commissioners, the tenancy is dissolved, and each proprietor holds the portion allotted to him in severalty, and his claim on the residue is at law extinguished. To this extent only are his rights adjudicated and determined.

This brings us to the only other question in the case, whether the complainants are in equity entitled to compensation for the improvement. At law, one tenant in common can compel the other tenants to join in the expense of reparations to a house or mill, where the repairs are necessary to the preservation and enjoyment of the estate. To sustain his action, he must show a request to unite in the reparations, and a refusal, as well as an actual expenditure in making them. In such case the expend-

iture is for the benefit of all the tenants, and contribution is enforced on the principle, that parties standing in equal rights, are bound to bear an equality of burden: 1 Thomas' Coke, 613; 4 Kent's Com. 370. At law, the complainants could not enforce contribution from the defendants. The improvement was not necessary as reparation to the common property, nor was the property itself of such a character as to bring the case within the principle of contribution. Nor could they compel them in equity to contribute. The erection of the dwelling-house was entirely voluntary, for the sole benefit of the party erecting it, not at all necessary for the preservation or joint enjoyment of the estate, and from which the defendants derived no advantage.

But this case stands on an entirely different footing. The complainants are not seeking for contribution. The tenancy has been destroyed, and the estate, so far as the parties are concerned, converted into money. The amount received at the sale was much augmented, by reason of the improvement erected at the sole cost of the ancestor of the complainants. The improvement passed with the land to the purchaser. The complainants only claim to have that increase of price allowed them, without interfering with a just distribution of the residue. Admitting this to be done, how are the defendants to be injured? They will still receive the same amount, to which they would have been entitled, had no improvement been made. They seem not to be content with such a distribution, but seek to participate equally in the value of the improvement, to the making of which, they have in no degree contributed. They claim an equality of benefits, but avoid an equality of burdens. If they insist on receiving the benefits of the labor of their co-tenants, they ought to make compensation therefor in return. And this seems to be the doctrine in equity. Thus it has been decided, where one tenant in common purchases in an incumbrance on, or an outstanding title to the estate, that the purchase will inure to the benefit of the other tenants, only on the condition of their paying their ratable proportion of the cost: *Van Horne v. Fonda*, 5 Johns. Ch. 388; *Lee v. Fox*, 6 Dana, 171. And where improvements have been made by one, the portion improved should, if practicable, be assigned to him, in the partition of the estate, without taking into consideration the increased value caused by such improvement; and when such a division can not be made, he should be allowed a reasonable remuneration from those who receive the benefit of the improvement: *Sneed's Heirs v. Atherton*, Id. 276; *Borah v. Archers*, 7 Id. 176. In natural justice,

the defendants are not entitled to share in the benefits of the improvement, but its value belongs exclusively to the complainants. It is but right and equitable, that the complainants should be allowed, by way of compensation, the actual increase of the price received at the sale, in consequence of the improvement erected by their ancestor.

To this end, the decree of the circuit court will be reversed, and the cause remanded, with instructions to that court, to ascertain the actual increase of the price, caused by the improvement. For this purpose, both parties should be permitted to introduce additional testimony. When the proper amount is ascertained, the court will direct the commissioner to pay it over to the complainants, and to distribute the balance among all the parties, according to their respective interests in the premises. The costs of this appeal will be divided equally between the parties.

Decree reversed.

SHIELDS, J., gave no opinion.

PROCEEDING FOR PARTITION is analogous to proceeding *in rem*: *Pillsbury's Lessee v. Dugan's Adm'r*, 34 Am. Dec. 427. The title is not meddled with in a partition suit, but the plaintiff must show a clear legal title: *Stewart's Heirs v. Coalter*, 15 Id. 731. It is not a proper proceeding to try title: *Manners v. Manners*, 35 Id. 513. Under the Illinois statute a judgment in partition has the same effect as a judgment on the ancient writ of partition. It dissolves the co-tenancy, and vests in each of the co-tenants a several title to the share set apart to him: *Hassett v. Ridgely*, 49 Ill. 202. Only the legal title is affected by the proceedings. It does not touch the equities of the parties. The judgment should define the respective legal interests of the parties: *Greenup v. Sewell*, 18 Id. 54. In both the cases last cited *Louvalle v. Menard* is recognised as an authority. A decree in partition does not settle the title or estop a subsequent legal investigation thereof in ejectment: *Nicely v. Boyle*, 40 Am. Dec. 638.

RIGHTS OF TENANT IN COMMON AS TO REPAIRS AND IMPROVEMENTS MADE BY HIM ON THE COMMON LAND.—A tenant in common can not make his co-tenant liable for repairs made on the common property, even though necessary, without a previous request and refusal to join in making them: *Mumford v. Brown*, 16 Am. Dec. 440, and note. He can not erect buildings or other improvements on the land without his co-tenant's consent, and then claim to hold the property until reimbursed for a portion of such improvements: *Crest v. Jack*, 27 Id. 353, and note. He is not entitled to compensation for such improvements: *Hancock v. Day*, 36 Id. 293. But in *Gwinnett v. Thompson*, 19 Id. 350, it was held that a tenant in common expending money for the general benefit in paying for repairs could recover from his co-tenant his proportion of the expense, where the title was not drawn in question. There, however, the co-tenants joined in the repairs, but there was an inequality in the proportions severally contributed by them. In *Nelson v. Clay*, 23 Id. 387, it is held that a tenant in common entering upon and improving unproductive common land, so as to make it productive, is entitled to the profits of such improvements to the exclusion of his co-tenant. And

a tenant in common having made improvements, is equitably entitled upon a partition to have the part upon which he has made the improvements allotted to him, estimating its value for the purpose of the division as it would be if no improvements had been made: *Patrick v. Marshall*, 4 Id. 670; *Nelson v. Clay*, 23 Id. 387. Especially where he has made the improvements under the belief that he was sole owner: *Town v. Needham*, 24 Id. 246. But if a portion of the improved land is allotted to the tenant who did not make the improvements, he is held, in *Nelson v. Clay*, *supra*, not to be liable to his co-tenant for the value of such improvements. The doctrine laid down in the principal case that on a partition under the statute a co-tenant who has made improvements is entitled to have the improved part allotted to him, estimating its value as if unimproved; or that if a division can not be had, and a sale is ordered, he is entitled to have the increase of price occasioned by the improvements paid to him out of the proceeds before a division, is approved and followed in *Howey v. Goings*, 13 Ill. 108; *Gardner v. Diedericks*, 41 Id. 171; *Kurtz v. Hübner*, 55 Id. 521; *Mahoney v. Mahoney*, 65 Id. 408. The case is cited to the same point in *Wilton v. Tammell*, 86 Id. 81.

PURCHASE OF OUTSTANDING TITLE BY TENANT IN COMMON, whether inures to benefit of co-tenants: See *Venable v. Beauchamp*, 28 Am. Dec. 74, and note; *Sneed v. Atherton*, 82 Id. 70; *Dennison v. Foster*, 84 Id. 429.

LIVINGSTON v. KETTELLE.

[1 GILMAN, 116.]

CERTIFICATE OF ACKNOWLEDGMENT TO MORTGAGE SUFFICIENTLY IDENTIFIES the party executing the instrument, where it states that the "above-named mortgagor" personally appeared before the certifying officer and was "personally known" to him "as the identical person who executed said mortgage" and "acknowledged the same as his free act and deed for purposes therein expressed."

OFFICIAL CHARACTER OF JUSTICE TAKING ACKNOWLEDGMENT is sufficiently shown by a certificate purporting to have been executed in a particular county, and stating that the officer is "an acting justice of the peace" without saying of what county.

COURT MAY TAKE JUDICIAL NOTICE OF WHO ARE JUSTICES OF THE PEACE of the county in which it is sitting.

SCIRE FACIAS to foreclose a mortgage. Judgment for the plaintiff, and the defendant appealed. The opinion states the case.

O. Ballance, for the appellant.

O. Peters, for the appellee.

By Court, **TREAT, J.** This was a proceeding by *scire facias* to foreclose a mortgage. The defendant pleaded *nul tiel record*. On the trial before the court, the plaintiff offered to read in evidence a mortgage corresponding with the one set out in the *scire facias*, to which was annexed a certificate of acknowledg-

ment in these words: "State of Illinois, Peoria County. Personally appeared before the undersigned, an acting justice of the peace, the above named mortgagor, who is personally known to me as the identical person, who executed said mortgage, and who acknowledged the same as his free act and deed for purposes therein expressed. A. M. Hunt, J. P. [Seal.]" The mortgage appeared to have been recorded. The defendant objected to the introduction of the mortgage, because the certificate of acknowledgment was defective, but the court allowed it to be read in evidence, and rendered judgment for the plaintiff. The defendant prosecutes an appeal, and assigns for error the decision of the court in permitting the mortgage to be read.

The eleventh section of the "act concerning conveyance of real property," R. L. 182; Gale's Stat. 150, forbids any officer from taking the acknowledgment of any person to a deed or instrument of writing, "unless the person offering to make such acknowledgment shall be personally known to him to be the real person who and in whose name such acknowledgment is proposed to be made, or shall be proved to be such by a credible witness," and requires that the officer taking the acknowledgment "shall in his certificate thereof, state that such person was personally known to him to be the person whose name is subscribed to such deed or writing, as having executed the same, or that he was proved to be such by a credible witness." The same act authorizes deeds thus acknowledged, to be recorded. The eighteenth section of the "act concerning judgments and executions," R. L. 376; Gale's Stat. 393, authorizes the foreclosure, by *scire facias*, of mortgages, which are duly executed and recorded."

The only point, then, for our decision, is whether the certificate of the acknowledgment of the mortgage was in compliance with the statute before referred to. It was said by this court, in the case of *McConnel v. Reed*, 2 Scam. 371, that "the evident object of the legislature, in these directions in relation to the acknowledgment of deeds, is to prevent one individual from personating another." That object, we think, has been fully accomplished in the present case. The certificate states, that the "above-named mortgagor" personally appeared before the justice, and that he was personally known to him as the identical person who executed the mortgage. This is equivalent to the statement, that the individual was personally known to the justice to be the person whose name was subscribed to the mortgage. The term, "the above-named mortgagor," must be under-

stood to mean the real party who was to execute the mortgage. We regard the certificate as a substantial compliance with the provisions of the statute. It is insisted, however, that the certificate is defective, in not showing that the person making it was a justice of the peace of Peoria county. The certificate purports on its face to have been made in Peoria county, and by a justice of the peace. The presumption from it is, that A. M. Hunt was a justice of the peace of that county, and acting in the line of his duty. Independent of this, the circuit court may, as a matter of convenience, take notice of the fact who are justices of the peace, for the county in which it is held, without strict proof of their official character: *Shattuck v. The People*, 4 Scam. 477. The judgment of the circuit court is therefore affirmed, with costs.

Judgment affirmed.

LOCKWOOD, J., gave no opinion.

ACKNOWLEDGMENTS OF DEEDS, WHEN FATALLY DEFECTIVE AND WHEN NOT.
It is difficult to lay down very precise rules for determining when an acknowledgment is to be deemed fatally defective, owing to the diversity of the statutes of the several states on this subject. There are, however, certain general principles deducible from the cases, which we purpose to discuss. We shall consider, first, acknowledgments in general, and, second, acknowledgments of married women.

SUBSTANTIAL COMPLIANCE WITH ALL STATUTORY REQUIREMENTS in taking an acknowledgment, is universally held necessary to its validity: *Knight v. Smith*, 1 Or. 276. And the certificate should show upon the face of it that there has been such compliance: *Jacoway v. Gault*, 20 Ark. 190; *Wetmore v. Laird*, 5 Biss. 160. The weight of authority, as well as the better reason, is in favor of the position that the taking and certification of acknowledgments are ministerial rather than judicial acts: *Biscoe v. Bird*, 15 Ark. 655; *Gill v. Fauntleroy*, 8 B. Mon. 177; *Odiotne v. Mason*, 9 N. H. 24; *Lynch v. Livingston*, 6 N. Y. 422; *Schultz v. Moore*, 1 McLean, 520. Though the contrary is held in some cases: *Jamison v. Jamison*, 3 Whart. 457; *Wasson v. Connor*, 54 Miss. 351. But whether ministerial or judicial, the power of an officer to take an acknowledgment is entirely statutory, and should be strictly pursued, at least in substance, and his certificate should show that he has done what the law requires. It is generally held insufficient for the officer to state merely that the acknowledgment, or, in case of a *feme covert*, the privy examination, was "according to law," or "in due form," or "satisfactory," or the like: *Gill v. Fauntleroy*, 8 B. Mon. 177; *Den ex dem. Lucas v. Cobbs*, 1 Dev. & B. L. 228; *Flanagan v. Young*, 2 Har. & M. 38; *Meddock v. Williams*, 12 Ohio, 377; *Den ex dem. Jones v. Lewis*, 8 Ired. L. 70. The facts should be stated, leaving the court to determine their sufficiency: *Gill v. Fauntleroy*, *Meddock v. Williams*, *supra*. A certificate that an acknowledgment by a *feme covert* was made "agreeably to the act," was, however, sustained in *Newcomb v. Smith*, Wright (Ohio), 208. And there are other cases, hereafter cited, which militate against the doctrine above laid down.

Literal and exact compliance with the very words of the statute is not,

however, required: *Tiffany v. Glover*, 3 G. Greene, 387; *Wickersham v. Reeves*, 1 Iowa, 413; *Cavender v. Smith*, 5 Id. 157; *Bell v. Evans*, 10 Id. 353. Acknowledgments are often taken and certificates thereof made by men of meager education: *Russ v. Wingate*, 30 Miss. 440. They should not therefore be strictly and technically, but liberally construed, if the substance is found: *Id.*; *Morse v. Clayton*, 13 Smed. & M. 373. It is the policy of the law to uphold conveyances: *Wells v. Atkinson*, 24 Minn. 161. And the court will therefore be "astute to find means" of making acknowledgments of deeds effectual: *Kelly v. Calkoun*, 95 U. S. 710. It is, therefore, well settled that a substantial compliance with the requirements of the statute as to the acknowledgment and the form of the certificate, is all that is necessary, and that if equivalent words to those of the statute are used, it is enough: *Carpenter v. Dexter*, 8 Wall. 513; *Bradford v. Dawson*, 2 Ala. 203; *Jacoway v. Gault*, 20 Ark. 190; *Henderson v. Grewell*, 8 Cal. 581; *Vance v. Schuyler*, 1 Gilm. 160; *Delamare v. Burnett*, 4 Id. 454; *Calumet etc. Co. v. Russell*, 68 Ill. 426; *Hollingsworth v. McDonald*, 3 Am. Dec. 545; *Young v. State*, 7 Gill & J. 200; *Warren v. Hardy*, 6 Md. 525; *Wells v. Atkinson*, 24 Minn. 161; *Halls v. Thompson*, 1 Smed. & M. 443; *Pickett v. Doe*, 5 Id. 470; *Morse v. Clayton*, 13 Id. 381; *Alexander v. Merry*, 9 Mo. 510; *Den ex dem. Sharp v. Hamilton*, 12 N. J. L. (7 Halst.) 109; *Sheldon v. Stryker*, 42 Barb. 284; S. C., 29 How. Pr. 387; *Barton v. Morris*, 15 Ohio, 408; *Dora v. Best*, 15 Tex. 62; *Monroe v. Arledge*, 23 Id. 478; *Wies v. Postlewait*, 3 W. Va. 452. And if the form of certificate provides for the statement of an utterly immaterial fact, such as that the deed was executed on the day of its date, that will not make the fact essential so as to render its omission fatal to the certificate: *Bradford v. Dawson*, 2 Ala. 203; *Hobson v. Kissam*, 8 Id. 357; *Carter v. Chaudron*, 21 Id. 72.

WHO MAY TAKE.—The statutes of the several states provide expressly what officers are authorized to take acknowledgments, and it is not designed in this note to go into that subject, further than to refer to some decisions which may seem to have a somewhat general applicability. Under a statute authorizing justices of the peace to take acknowledgments, an acknowledgment taken by a judge of the supreme court was held to be valid, because such a judge was an *ex officio* justice of the peace: *Middlebury College v. Cheney*, 1 Vt. 33. Where "magistrates" in a foreign state or kingdom are authorized to take acknowledgments, an acknowledgment taken by an American consul at a foreign port is valid: *Scanlan v. Wright*, 25 Am. Dec. 344. A mayor of a town, it seems, can not take acknowledgments under a statute giving authority therefore to mayors of cities: *Dundy v. Chambers*, 23 Ill. 369. A deputy clerk may take acknowledgments where the principal, if present, would be empowered to do so: *Kemp v. Porter*, 7 Ala. 138; *Touchard v. Crow*, 20 Cal. 150; *Muller v. Boggs*, 25 Id. 186; *Emmal v. Webb*, 36 Id. 203; *Hope v. Sawyer*, 14 Ill. 254; *Abrams v. Ervin*, 9 Iowa, 87; *Babbitt v. Johnson*, 15 Kan. 252; *Moore v. Farrow*, 3 A. K. Marsh. 41; *Talbott v. Hooser*, 12 Bush, 408; *McRavin v. McGuire*, 9 Smed. & M. 34; S. C., 23 Miss. 100; *Gibbons v. Gentry*, 20 Mo. 468; *Beaumont v. Yeatman*, 8 Humph. 542; *Rose v. Newman*, 26 Tex. 181; *Cook v. Knott*, 23 Id. 85, overruling *dictum* to the contrary in *Miller v. Thatcher*, 9 Id. 462.

In some of the states it is held that the certificate, in such a case, must purport in the body of it to be made by the principal, and must be signed with the principal's name "by A. B. deputy." *Abrams v. Ervin*, 9 Iowa, 87; *Gibbons v. Gentry*, 20 Mo. 468. In others it is held that the deputy may make and sign the certificate in the principal's name without annexing to the signature anything to show it is affixed by the deputy: *Talbott v. Hooser*, 12

Bush, 408. In others still it is held that a certificate running throughout is the deputy's name, without mentioning the principal either in the body of it or in the signature, is valid: *Beaumont v. Yeatman*, 8 Humph. 542; *McRoe v. McQuire*, 23 Miss. 100; *Touchard v. Crow*, 20 Cal. 150. In the case last cited a certificate attested and signed as follows, was held good: "Witness my hand and seal of court affixed at office this thirtieth day of July, 1852. John A. Brewster, deputy county clerk of Sonoma county." Where an acknowledgment is taken in another state and the certificate is signed "A. G., clerk, by E. B., deputy clerk," it is *prima facie* evidence that the clerk in that state has power to appoint a deputy: *Hope v. Sawyer*, 14 Ill. 254. An acknowledgment taken by an officer *de facto* is good if it would be so if he were an officer *de jure*, although the person taking it may be liable to a statutory penalty for doing so: *Woodruff v. McHARRY*, 56 Ill. 218; *Brown v. Lunt*, 37 Mo. 423; *Prescott v. Hayes*, 42 N. H. 56. As where a justice takes the acknowledgment after his commission has expired, he having no knowledge of that fact: *Brown v. Lunt*, *supra*; or where he takes it during the continuance of the term for which he was elected or appointed, but after his removal from the state: *Prescott v. Hayes*, *supra*. An officer interested in obtaining a conveyance can not take the acknowledgment thereof: *Withers v. Baird*, 33 Am. Dec. 784, and note considering that subject at length. Therefore the grantee can not take it: *Beaman v. Whitney*, 22 Mo. 413; *Groesbeck v. Seeley*, 13 Mich. 329; even though he is merely a trustee: *Dall v. Morse*, 51 Mo. 589; *Brown v. Moore*, 38 Tex. 645. But a party interested in part of an entire tract may take the acknowledgment of a conveyance of a distinct interest in the same tract: *Dussanne v. Burnett*, 5 Iowa, 95. An officer related to one of the parties may take an acknowledgment in New York, because the act is not judicial: *Lynch v. Livingston*, 6 N. Y. 422.

PROOF OF OFFICIAL CHARACTER of the officer taking an acknowledgment is not necessary to give it validity in the absence of any statute requiring such proof, if the certificate purports to have been made by an officer authorized by law to take acknowledgments and is in due form, but the certificate itself is *prima facie* evidence of that fact: 3 Wash. on Real Prop., 3d ed., 291; *Carpenter v. Dexter*, 8 Wall. 513; *Willink v. Miles*, 1 Pet. C. C. 429; *Thompson v. Morgan*, 6 Minn. 292; *Harding v. Ourtie*, 45 Ill. 252; *Thurman v. Cameron*, 24 Wend. 87. Where the acknowledgment is taken without the state by a commissioner of deeds appointed by the executive authority of such state, no proof of his authority other than authentication by his seal is required: *Smith v. Van Gilder*, 26 Ark. 527; *Vance v. Schuyler*, 1 Gilman. 160; *Thompson v. Schuyler*, 2 Id. 271; *Irving v. Brownell*, 11 Id. 402. So in Virginia and Kentucky an acknowledgment taken and certified by a mayor of a city in another state, under his official seal, being full and particular in form, is deemed sufficient to entitle the deed to be recorded: *Coles v. Miller*, 8 Gratt. 6; *Hassler v. King*, 9 Id. 115; *Ewing v. Savary*, 3 Bibb, 235; *McCulloch v. Myers*, 1 Dana, 522; *Bell v. Fry*, 5 Id. 341. So, in Virginia an acknowledgment taken before two aldermen of the city of New York, describing themselves as such, was held sufficient under a statute authorizing acknowledgments to be taken by justices of the peace in any of the states of the union, the presumption being that the aldermen were *ex officio* justices of the peace, that being generally the case with aldermen of cities: *Wells v. Cole*, 6 Gratt. 645. But where the acknowledgment is taken in a foreign country by an officer unknown to the law of the state where the land lies, the authority to take it must be shown to give it validity: *De Segond v. Ouleer*, 10 Ohio, 188. There are, however, statutes in many if not most of the states requir-

ing acknowledgments taken in another state or country, unless taken by a commissioner of deeds, to be authenticated by the certificate of the proper certifying officer of a court of record, to the effect that the officer taking the acknowledgment was, at the date thereof, such officer as he pretends to be, etc., and that the deed was executed and acknowledged conformably to the law of the place of execution. Where such certificate is required the absence of it of course vitiates the acknowledgment: *Morton v. Smith*, 2 Dill. 316. Such certificate of authentication, though made long after the taking of the acknowledgment, is sufficient, it seems: *Dunlap v. Daugherty*, 20 Ill. 397. So, though it states the execution and acknowledgment to have been conformable to "existing" laws: *Harrington v. Fish*, 10 Mich. 415. This matter is so far regulated by express local statutes, however, that it would not be profitable to attempt to collect all the cases bearing upon it.

An officer taking an acknowledgment need not state in his certificate that he is authorized to do so: *Livingston v. McDonald*, 9 Ohio, 168. But it must, in general, purport to have been taken by an officer authorized by law to take acknowledgments: *Cassell v. Cooke*, 11 Am. Dec. 610; *Johnson v. Haines*, 15 Id. 533. The official character may, however, be sufficiently shown by additions to the signature, without being stated in the body of the certificate: *Russ v. Wingate*, 30 Miss. 440. As by the addition of the letters "J. P." to the signature, which will be taken to mean justice of the peace: Id. Particularly where in case of an acknowledgment taken in another state there is an accompanying certificate from the proper authority that the officer whose name is so signed was a justice of the peace: *Final v. Bachus*, 18 Mich. 218. In like manner the addition of "N. P." may be taken to mean notary public: *Rowley v. Berrian*, 12 Ill. 200. In some states evidence *aliunde* is admissible to show the official character of an officer taking an acknowledgment, if it is not asserted in the certificate: *Bennet v. Paine*, 32 Am. Dec. 765; *Vanness v. Bank of United States*, 13 Pet. 21; *Shultz v. Moore*, 1 McLean, 520; *Rhodes v. Selin*, 4 Wash. C. C. 718; *Jeffreys v. Collis*, 4 Dana, 470.

WHERE MAY BE TAKEN.—WHETHER LOCALITY MUST APPEAR FROM CERTIFICATE.—In many of the states there are express statutes requiring acknowledgments to be taken in the county or district where the land lies or the grantor resides, or for which the officer is appointed or the like; and of course such statutes must be complied with to give validity to the act: *Gittings v. Hall*, 2 Am. Dec. 502; *Johns v. Reardon*, 3 Md. Ch. 57; *McCulloch v. Myers*, 1 Dana, 522; *Dickerson v. Talbot*, 14 B. Mon. 49; *Hedger v. Ward*, 15 Id. 106; *Garrison v. Haydon*, 1 J. J. Marsh. 222; *Hughes v. Wilkinson*, 37 Miss. 482. But where the statute provides that acknowledgments may be taken before any judge, justice of the peace, or notary public in the state, a justice of the peace may certainly take an acknowledgment to a conveyance of land lying outside his county: *Duly v. Brooks*, 30 Mo. 515. And in a number of cases it is held that as the act of taking an acknowledgment is ministerial and not judicial, a justice may take an acknowledgment outside his county under such a statute: *Biscoe v. Byrd*, 15 Ark. 655; *Odiorne v. Mason*, 9 N. H. 30; *Learned v. Allen*, 14 Allen, 109; *Crumbaugh v. Kugler*, 2 Ohio St. 373. So under a similar statute a mayor of a city may take an acknowledgment outside the city: *Moore v. Moore*, 3 Id. 154. But in *Shars v. Anderson*, 10 Am. Dec. 421, it was held on the contrary that a justice of the peace could not take an acknowledgment or perform any other official act outside his county. On the ground that the act of taking an acknowledgment is ministerial and not judicial, it has been decided also that in the absence of any statute to the contrary a judge may take acknowledgments out-

side his state for land lying within it: *Moore v. Vance*, 1 Ohio, 1; *Kinsman v. Loomis*, 11 Id. 475. On the other hand it was determined in *Jackson v. Humphrey*, 1 Johns. 498, that a judge could not take proof of a deed outside the state because outside his territorial jurisdiction he had no authority to administer oaths. So, that a commissioner authorized to take acknowledgments could not do so outside his state: *Jackson v. Golden*, 4 Cow. 206; although the party procuring the acknowledgment could not object.

The better doctrine is, as it seems to us, that where the law confers upon an officer the authority to take and certify acknowledgments, that authority, being ministerial in its nature, attaches to him wherever he may be, unless there is something in the statute restricting it within territorial limits. Even where the authority of an officer to take acknowledgments is held to be limited to a particular locality, it is not necessary that it should appear from the certificate of an acknowledgment taken by him that it was taken within his jurisdiction. The presumption is, that it was so taken until the contrary appears: *Carpenter v. Dexter*, 8 Wall. 513; *Rackleff v. Norton*, 19 Me. 274; *Morrison v. White*, 16 La. Ann. 100; *Bradley v. West*, 60 Mo. 33; *Sidwell v. Birney*, 69 Id. 144. If the place of taking the acknowledgment does not appear from the certificate, it is, nevertheless, sufficient if the place can be ascertained with reasonable certainty from the whole instrument: *Brooks v. Chaplin*, 23 Am. Dec. 209; *Fuhrman v. London*, 15 Id. 608; *Doe ex dem. Truluck v. Roe*, 1 Ga. 3.

Where the acknowledgment is taken by a justice without stating of what county, the caption may be resorted to to ascertain the county: *Wright v. Wilson*, 17 Mich. 192; *Dunlap v. Daugherty*, 20 Ill. 397; *Sidwell v. Birney*, 69 Mo. 144. If the name of the county is omitted in the caption, the defect may be remedied, at least in some states, by proof of what county the officer was justice: *Scott v. Gallagher*, 11 Serg. & R. 347; *Dunlap v. Daugherty*, 20 Ill. 397; *Graham v. Anderson*, 42 Id. 514. Or if taken within the county where the court is sitting, judicial notice will, in Illinois, be taken of the fact that the officer taking it is justice of that county: *Irving v. Brownell*, 11 Id. 402; *Graham v. Anderson*, 42 Id. 514. Or in case of an omission to name the county in the caption, if the seal of a particular county is attached, and the certificate purports to have been made by the clerk of the county court, the acknowledgment will be upheld: *Chiniquy v. Catholic Bishop*, 41 Id. 148. But where the law requires an officer to set forth his title in the certificate, a notary omitting to state of what county he is notary, renders the certificate invalid, though the name of the county appears on his seal affixed to the instrument: *Willard v. Oramer*, 39 Iowa, 22. It is held, however, in *Vance v. Schuyler*, 1 Gilm. 160, that a certificate of acknowledgment must be entitled of some assignable locality, which the court can judicially notice, and that "Lincoln ss. Wiscasset," is not enough. Where the name of the state was omitted in the caption of a certificate of acknowledgment, taken outside the state, the caption being merely "county of New York," and there was nothing in the certificate or in the deed to show in what state the acknowledgment was taken, the defect was held fatal: *Hardin v. Kirk*, 49 Ill. 153. But in a subsequent decision upon the same certificate, it was held that the defect was cured by a certificate from the county clerk of New York county, state of New York, showing that the officer who took the acknowledgment was a duly authorized commissioner of that county and state: *Hardin v. Osborne*, 60 Id. 93. Where a notary, taking the acknowledgment of a conveyance of land in L. county, described himself in the body of the certificate as a notary public of that county, but signed his name as notary public of another county,

the certificate was nevertheless considered, though not decided, to be sufficient to authorize the deed to be read in evidence: *Merchants' Bank v. Harrison*, 39 Mo. 433.

DATE OF A CERTIFICATE OF ACKNOWLEDGMENT is not material, and its omission does not vitiate the acknowledgment if otherwise sufficient: *Irving v. Brownell*, 11 Ill. 402; *Wickes v. Conk*, 5 Harr. & J. 36; *Rackleff v. Norton*, 19 Me. 274; *Doe ex dem. Truluck v. Roe*, 1 Ga. 3. So even though the form of certificate prescribed by statute calls for the date: *Hobson v. Kissam*, 8 Ala. 357. It will be presumed to have been taken and certified in due time: *Rackleff v. Norton*, 19 Me. 274; *Doe ex dem. Truluck v. Roe*, 1 Ga. 3; *Wickes v. Conk*, 5 Har. & J. 36. The acknowledgment may be made and certified at any time after the execution of the deed before it is offered in evidence: *Johnson v. McGehee*, 1 Ala. 186; *Harrington v. Gage*, 6 Vt. 532; *Pitkin v. Leavitt*, 13 Id. 379; *Pierce v. Brown*, 24 Id. 165. Although it will not affect bona fide purchasers unless made and recorded within the time required by law: *Johnson v. McGehee*, 1 Ala. 186. Even though the acknowledgment is made after action brought, the deed may nevertheless be received in evidence: *Kelly v. Dunlap*, 3 Penn. 136. Under the Kentucky act of 1802, it was held that an acknowledgment of a deed could not be taken after the time for recording it had expired: *Dickerson v. Talbot*, 14 B. Mon. 49. An officer having taken an acknowledgment may subsequently certify it at any time while he remains in office, if the rights of third persons do not intervene, the certificate being merely a clerical act: *Harmon v. Magee*, 57 Miss. 410. Where a statute requires the date of the certificate of an acknowledgment to be stated, its omission may be supplied by resorting to the deed itself, or to the authentication of the clerk accompanying the certificate as to the authority of the officer to take the acknowledgment: *Bradford v. Dawson*, 2 Ala. 203; *Kelly v. Rosenstock*, 45 Md. 389. If the certificate bears date before the deed, it is not a substantial defect, but the true date may be shown: *Gest v. Flock*, 2 N. J. Eq. (1 Green's Ch.) 108.

SIGNING AND SEALING BY OFFICER.—No doubt the officer taking the acknowledgment must sign it. The insertion of his name in the body of the certificate is not enough: *Marston v. Brashaw*, 18 Mich. 81. But where there are separate acknowledgments by a husband and wife on the deed, one immediately under the other, each having a separate caption, but the bottom one only is signed, it is sufficient: *Wright v. Wilson*, 17 Id. 192. Where an acknowledgment was taken in Liverpool, and purported to have been taken before the mayor of Liverpool, whose official seal was attached, but the certificate, though running in the mayor's name, was signed by the town clerk, it was held sufficient, it being presumed that that was the mayor's usual mode of authenticating official acts: *Sessions v. Reynolds*, 7 Smed. & M. 130. If the officer taking the acknowledgment has described his official character in the body of the certificate, the omission of any official addition in signing his name is not material: *Brown v. Furrar*, 3 Ohio, 140.

An officer taking and certifying an acknowledgment must not only sign it but affix his official seal, if the statute requires a seal, as is the case in many if not most of the states, the seal being essential to the validity of the act: Proffatt on Notaries, sec. 38; *Richards v. Randolph*, 5 Mason, 115; *Little v. Dodge*, 32 Ark. 453; *Hastings v. Vaughn*, 5 Cal. 315; *Booth v. Cook*, 20 Ill. 129; *Holbrook v. Nichol*, 36 Id. 161; *Miller v. Henshaw*, 4 Dana, 325; *Kemper v. Hughes*, 7 B. Mon. 255; *Buell v. Irwin*, 24 Mich. 145; *Duncan v. Duncan*, 1 Watts, 322; *Barney v. Sutton*, 2 Id. 31; *McCreary v. McCreary*, 9 Rich. Eq. 34; *Ballard v. Perry*, 23 Tex. 347; *Texas Land Co. v. Williams*,

51 Id. 51. Indeed, in the case of notaries a seal would seem to be essential without any special requirement, for all notarial acts "should be attested by a notarial seal:" *Booth v. Clark*, 12 Ill. 129. In many cases, however, it has been held that a seal is not essential to the validity of a certificate of acknowledgment, even by a notary or commissioner of deeds, unless required by an express statute: *Powers v. Bryant*, 7 Port. 9; *Harrison v. Simons*, 55 Ala. 510; *Irving v. Brownell*, 11 Ill. 402; *Thompson v. Robertson*, 9 B. Mon. 383; *Farnum v. Buffum*, 4 Cush. 260; *Thompson v. Morgan*, 6 Minn. 292; *Fund Commissioners v. Glass*, 17 Ohio, 542; *Jaques v. Weeks*, 7 Watts, 281. Where a notary is required to affix his seal, his official seal is meant, and he can not use a private seal, even though he has not yet provided himself with an official seal, unless there is some statute allowing it: *Mason v. Brock*, 12 Ill. 273. Otherwise where there is such a statute: *Fogarty v. Sawyer*, 23 Cal. 570. But in *Collins v. Boyd*, 5 Dana, 318, it was held that an officer might affix to a certificate of acknowledgment a seal which he was accustomed to use as his official seal, though he described it in the attestation clause as "his private seal (no seal of the office being yet provided)." Omitting to state that the certificate of a commissioner of deeds was given under his hand and seal, where his seal and signature were in fact affixed, was held not to invalidate the certificate, in *Harrington v. Fish*, 10 Mich. 415. So where the certificate of a notary is stated to have been given under his "hand and seal," without saying official seal, if the notarial seal is in fact affixed, it is sufficient: *Moore v. Titman*, 33 Ill. 358; *Mource v. Arledge*, 23 Tex. 478. But the contrary was determined in *Wetmore v. Laird*, 5 Biss. 160, where only a copy of the instrument was before the court. Where the word "seal" was omitted in the attestation clause, which was, "Given under my hand and of office," and the seal was affixed, the omission was held to be merely clerical and not material, as every person of common understanding would know what was meant: *Nichols v. Stewart*, 15 Tex. 226.

MERE SURPLUSAGE AND CLERICAL ERRORS AND OMISSIONS do not vitiate a certificate of acknowledgment. Redundant and unnecessary words in the certificate will be rejected if it is sufficient without them; *Stuart v. Dutton*, 39 Ill. 91. As where a witness is sworn to the facts stated, and a *jurat* is added to a certificate which is otherwise perfect: *Whitney v. Arnold*, 10 Cal. 531. So where the acknowledgment of parties who are not required to acknowledge the instrument is added and is defective, and there is a sufficient acknowledgment by the persons required to acknowledge it: *Bradford v. Dawson*, 2 Ala. 203. So where, in the certificate of an acknowledgment of a sheriff's deed, the clerk inserts matter which he is required to enter upon his record, but which is not essential to the certificate: *Crowley v. Wallace*, 12 Mo. 143. Other instances of surplusage will be given in a subsequent part of this note.

In like manner, omissions of immaterial words, or of words which can be supplied from the context of the certificate, will be deemed merely clerical errors, and will not vitiate the acknowledgment. As where the word "be" is omitted in that part of the certificate relating to the identity of the grantor, the language being: "Known to me to — the president of the B. Mill and Mining Company:" *Johnson v. Badger Mill etc. Co.*, 13 Nev. 351. So where the certificate, after stating the names of the parties, says: "Who — personally known to me," omitting the word "are" before "personally:" *Hartshorn v. Dawson*, 79 Ill. 108. So where the word "known" is omitted after "fully" in the expression, "The contents of said indenture being made fully known to her:" *Hornbeck v. Mutual Building etc. Association*, 88 Pa. St.

64. So where "his" is omitted before "free and voluntary act:" *Dickerson v. Davis*, 12 Iowa, 353. So where "appeared" is omitted, the certificate running: "Before me, a notary public, etc., personally — F. A. M., to me personally known, etc., and acknowledged:" *Scharfenburg v. Bishop*, 35 Id. 60. But, as will be shown hereafter, omissions of matters of substance which can not be supplied from the context, are fatal, although there are some cases in which the omission of words, generally deemed essential, has been held to constitute mere clerical misprision. Cases to that effect will be cited elsewhere. It is clear that bad grammar will not render a certificate defective. Thus, the substitution of "his" for "its," in referring to the deed of a corporation, as "his act and deed," has been held immaterial: *Frostburg etc. Association v. Brace*, 51 Md. 508. So where by a slip of the pen one word is written for another, as where "husband" is written for "deed," in the expression: "The contents and meaning of said husband were fully explained and made known to her:" *Callumet etc. Co. v. Russell*, 68 Ill. 426. Referring to a deed in the certificate of acknowledgment as the "foregoing mortgage," is a mere clerical misprision: *Ives v. Kimball*, 1 Mich. 306. Interlineations or erasures in the certificate are said, in *Devinney v. Reynolds*, 1 Watts & S. 328, to invalidate it as proof of the execution of the deed, but not to avoid the deed.

IDENTITY OF PARTY ACKNOWLEDGING.—The essential features of an ordinary acknowledgment are that it should show the identity of the party who makes the acknowledgment with the party who executed the deed, and the fact of the acknowledgment: *Henderson v. Grewell*, 8 Cal. 581. And first as to the identity of the party. The statutes relating to acknowledgments almost universally require the officer taking an acknowledgment to certify that the party making it was personally known or proved to him by a credible witness, satisfactory evidence, or the like, to be the same person who executed the deed, and substantial compliance with this requirement is indispensable to the validity of the acknowledgment: *Fogarty v. Finlay*, 10 Cal. 239; *Kimball v. Semple*, 25 Id. 440; *Gove v. Cather*, 23 Ill. 634; *Lindley v. Smith*, 46 Id. 523; *Becker v. Quigg*, 54 Id. 390; *Brinton v. Seewers*, 12 Iowa, 389; *Reynolds v. Kingsbury*, 15 Id. 238; *Garnier v. Barry*, 28 Mo. 438; *Callaway v. Fash*, 50 Id. 420; *Miller v. Link*, 2 Thomp. & C. 86; *Fryer v. Rockefeller*, 63 N. Y. 268; *Pinckney v. Burrage*, 31 N. J. L. 21; *Peacock v. Tompkins*, 1 Humph. 135; *Garrett v. Stockton*, 7 Id. 84; *Fall v. Roper*, 3 Head, 485; *Johnson v. Walton*, 1 Sneed, 258; *Smith v. Garden*, 28 Wis. 685. Although this seems not to be required in Connecticut, where it will be presumed that the officer did his duty in taking the acknowledgment, and therefore acted upon personal knowledge or satisfactory proof of the party's identity: *Sanford v. Bulkley*, 8 Conn. 348, per Butler, J. So in New York prior to 1797: *Northup v. Wright*, 7 Hill, 479; *Crowder v. Hopkins*, 10 Paige, 183. Where the officer is required to certify that the person making the acknowledgment is personally known to him or proved by competent testimony to be the identical person who executed the deed, it is not enough for him to say that he is "satisfied" of that fact. He must show how he is satisfied, whether from personal knowledge or from the evidence prescribed by the statute: *Shephard v. Carriel*, 19 Ill. 313; *Kimball v. Semple*, 25 Cal. 440. Otherwise where the statute authorizes him to certify merely that he is satisfied of the identity: *Pinckney v. Burrage*, 31 N. J. L. 21. The length of acquaintance which will authorize an officer to certify that he personally knows a party must be left to his own conscience. It seems that a mere introduction at the time of the acknowledgment is enough if it satisfies the officer's conscience: *Wood v.*

Bach, 54 Barb. 184; *Nippel v. Hammond*, 4 Col. 211. Though the contrary was held in *Jones v. Bach*, 48 Barb. 568. A certificate that the party whose name is subscribed to the deed, and "who by good authority to me given is the identical person," etc., appeared and acknowledged the deed, was held insufficient under a statute requiring the officer to certify that the party was "personally known or proved" to him to be the same person: *Becker v. Quigg*, 54 Ill. 390. Under such a statute, it is held, also, that a certificate will be fatally defective which states that the deed was acknowledged by the "above-named persons who executed the foregoing instrument:" *Brinton v. Seavers*, 12 Iowa, 399; or by parties named and described as the "grantors of the within indenture:" *Fryer v. Rockefeller*, 63 N. Y. 268; or by A. B., "signer and sealer of the foregoing instrument:" *Miller v. Link*, 2 Thomp. & C. 86; nothing being said as to the officer's knowledge of the identity. Where the certificate was, "Before me, etc., personally appeared C. A. D., to be the individual described in, and who executed the foregoing instrument," etc., omitting the words "personally known," it was held a fatal defect, and not a mere clerical error: *Wolf v. Fogarty*, 6 Cal. 224.

Literal compliance with the statute on this point is not essential, however, and the certificate is sufficient if it states that the party is "known" to the officer, omitting the word "personally:" *Hopkins v. Delaney*, 8 Cal. 86; *Welch v. Sullivan*, Id. 511; *Tully v. Davis*, 30 Ill. 103; *Todd v. Jones*, 22 Iowa, 146; *Rosenhal v. Griffin*, 23 Id. 263; *Warner v. Hardy*, 6 Md. 525; *Alexander v. Merry*, 9 Mo. 510; *Robson v. Thomas*, 55 Id. 581; *Sheldon v. Stryker*, 42 Barb. 284; S. C., 29 How. Pr. 387; *Davis v. Boyle*, 11 Heisk. 315. Though such an omission was held to render the certificate defective "for some purposes" in *Gould v. Woodward*, 4 G. Greene, 82. Personal knowledge is implied in such a certificate: *Todd v. Jones*, 22 Iowa, 146. "Well known" is of course sufficient: *Bell v. Evans*, 10 Iowa, 353, or "well acquainted:" *Delanay v. Burnett*, 4 Gilm. 454. So, "personally known" is sufficient where the statute uses the words "personally acquainted:" *Kelly v. Calhoun*, 95 U. S. 710. Omitting the words "described in and who executed" is immaterial where the certificate states that the party is known to be the identical person whose name is subscribed to the deed: *Henderson v. Grewell*, 8 Cal. 581; or who "executed" it: *Thurman v. Cameron*, 24 Wend. 87. Stating the party to be known to be the person "who signed and sealed" the deed satisfies the statutory requirement that he shall be known as the person "whose name is subscribed as a party:" *Tiffany v. Glover*, 3 G. Greene, 387. So where the statute requires that the party shall be known to the officer as the person who executed the deed, a statement that he is known to be the party described in it, is sufficient: *Hunt v. Johnson*, 19 N. Y. 279. So merely naming the grantor and saying that the officer knows him has been held sufficient: *Jackson v. Gumaer*, 2 Cow. 552. So referring to him as the "within named J. S." and stating that he is known to the officer is sufficient evidence of identity without stating that he is known to be the party who executed the deed: *Bell v. Evans*, 10 Iowa, 353. It seems that if the officer omits to certify that the party is personally known to him to be the person who executed the deed, the defect may be cured by resorting to the deed, where the attestation clause shows that he was one of the subscribing witnesses and that the deed was "signed, sealed, and delivered" in his presence: *Carpenter v. Dexter*, 8 Wall. 513.

OMISSION OR ERROR AS TO PARTY'S NAME.—The certificate of acknowledgment ought, as a part of the evidence of identity, to give the name of the party making the acknowledgment. Indeed the omission of the name has

been held in some cases to invalidate the certificate; as where a blank is left where the name ought to appear, the certificate running, "Personally appeared — who acknowledged," etc.: *Smith v. Hunt*, 13 Ohio, 280; *Hayden v. Westcott*, 11 Conn. 129. So where the Christian name was omitted, the acknowledgment purporting to have been made by "— Murray:" *Hiss v. McCabe*, 45 Md. 77. But where the language of the certificate was: "Personally appeared —, signer and sealer of the foregoing instrument, and acknowledged," etc., it was held sufficient to import an acknowledgment by the grantor: *Sanford v. Bulkley*, 30 Conn. 344. So where the certificate was: "Came before me, the undersigned, etc., —, to me personally well known, etc., and acknowledged," etc., and the grantor was subsequently named in the wife's part of the acknowledgment: *Magness v. Arnold*, 31 Ark. 103. The omission of the surname was held not to vitiate a certificate, otherwise formal, in *Chandler v. Spear*, 22 Vt. 388, where the deed purported to have been executed by Richard G. Bailey, and the acknowledgment by Richard G. In case of an acknowledgment of a deed in open court under the Virginia statute of 1792, where the certificate did not show by whom the acknowledgment was made, it was held that it would be presumed to have been made by the grantor: *Wise v. Postlewait*, 3 W. Va. 452. See also *Phillips v. Ruble*, Litt. Sel. Cas. 221, upholding a similar acknowledgment. Of course if the name in the certificate differs from that in the deed, as where the deed purports to be by Harmon Sherman and the acknowledgment by Hiram Sherman, the defect is fatal: *Boothroyd v. Engles*, 23 Mich. 19. An omission in the certificate to describe the grantor as trustee where he executes the deed as trustee does not vitiate the acknowledgment: *Dail v. Moore*, 51 Mo. 589. A certificate of an acknowledgment of a deed of a corporation by its officers as "their act and deed" is sufficient if it otherwise appears that the acknowledgment is made for the corporation: *Tenney v. East Warren etc. Co.*, 43 N. H. 343; *McDaniels v. Flower etc. Co.*, 22 Vt. 274.

FACT OF ACKNOWLEDGMENT MUST BE STATED.—The certificate must state that the party acknowledged the execution of the deed, by the use of the word "acknowledge," or something equivalent thereto, or it will be fatally defective: *Bryan v. Ramirez*, 8 Cal. 461; *Stanton v. Button*, 2 Conn. 527; *Short v. Conlee*, 28 Ill. 219; *Dewey v. Campan*, 4 Mich. 585; *Cabell v. Grubbs*, 48 Mo. 353. It was held, however, in *Jackson v. Gilchrist*, 15 Johns. 89, that if the certificate showed that the parties came before the officer "to acknowledge," etc., it would be presumed that they did acknowledge it. But this is doubtful doctrine to say the least of it. That was, however, a case of an ancient deed. The case is a good illustration of the extent to which courts will sometimes go in their anxiety to uphold an informal acknowledgment. The same fact is illustrated still more forcibly perhaps in a late case in Maryland, in which it was decided that where the words "acknowledged the said mortgage" were omitted in a certificate, stating that W. S. personally appeared before the officer, "he being known to me to be the person who is named and described as, and professing to be the attorney named in the letter or power of attorney contained in the foregoing mortgage or instrument of writing—to be the act and deed," etc., the omission was not fatal, being regarded as a mere clerical mispision, and the meaning could be supplied from the context: *Basshor v. Stewart*, 54 Md. 376; S. C., 25 Alb. L. J. 16.

As already intimated, the word "acknowledge" is not essential to a certificate of acknowledgment. Equivalent words are sufficient. If the words "deposes and says" are used, they will be deemed equivalent: *Chouteau v.*

Allen, 70 Mo. 290. So where the certificate is in the form of an affidavit stating that the grantor made oath to the execution of the instrument: *Ingraham v. Grigg*, 13 Smed. & M. 22. It was held in *Dewey v. Campan*, 4 Mich. 565, that the use of the word "stated" instead of "acknowledged," would not be sufficient, but this is entirely too hypercritical and technical as it seems to us. Words are not necessary to make a good acknowledgment. A deed may, no doubt, be well acknowledged by signs: *Hoboken Land Improvement Co. v. Kerrigan*, 31 N. J. L. 13. In that case it was held that a certificate that the deed was signed and sealed and delivered in the presence of the officer sufficiently imported an acknowledgment, "if not in words, by significant and unmistakable signs," particularly as it was an ancient deed. To the same effect is *Wise v. Postlewait*, 3 W. Va. 452. An acknowledgment taken through a sworn interpreter was held insufficient where there was no authority to swear an interpreter: *Dewey v. Campan*, 4 Mich. 565. So an acknowledgment based on a formal inquiry in English of a married woman who did not understand English was held to be a nullity in *Fisher v. Meister*, 24 Mich. 447. Other cases bearing on this point are referred to in discussing acknowledgments of married women.

A certificate that the grantor "acknowledged" the deed, satisfies a requirement that he should acknowledge the execution of it: *Davay v. Cardwell*, 27 Ind. 478. Stating in an acknowledgment that he "executed" it, is sufficient where the statute says "subscribed," or "signed, sealed, and delivered" it: *Dorn v. Best*, 15 Tex. 62; *Smith v. Williams*, 38 Miss. 48. So an acknowledgment that the party "signed, sealed, and delivered," or "signed and sealed," or "signed" only, has been held equivalent to an acknowledgment that he "executed" a deed: *Jacoway v. Gault*, 20 Ark. 190; *Tubbs v. Gatewood*, 26 Id. 128; *Stuart v. Dutton*, 39 Ill. 91. Omitting the word "signed," where the statutory formula was "signed, sealed, and delivered," was held fatal in *Smith v. Elliott*, 39 Tex. 201. So the omission of the words "sealed and delivered," stating that she "signed" only in an acknowledgment by a *feme covert*, though in the first part of the certificate there was an acknowledgment of signing, sealing, and delivery, by both husband and wife: *Toulmin v. Heidelberg*, 32 Miss. 268. But the contrary was held, as to a similar acknowledgment, in *Barton v. Morris*, 15 Ohio, 408. Of course, where a seal is not required, the omission of the word "sealed" is immaterial: *Belcher v. Weaver*, 46 Tex. 293; S. C., 26 Am. Rep. 267. An acknowledgment of the instrument as the party's "act and deed," sufficiently imports that he "executed" it, or "signed, sealed, and delivered" it: *Den ex dem. Sharp v. Hamilton*, 12 N. J. L. (7 Halst.) 109; *Davis v. Bogle*, 11 Heisk. 315; *Brown v. Farran*, 3 Ohio, 140; *Halls v. Thompson*, 1 Smed. & M. 443. Where the acknowledgment is by a party *sui juris*, the certificate need not show that the act was done "freely and voluntarily," though the statute uses those words: *Henderson v. Grevell*, 8 Cal. 281. But in Iowa, it must appear upon the face of the certificate that it is the party's voluntary act, by the use of those or equivalent terms: *Wickersham v. Reeves*, 1 Iowa, 413; *Dickerson v. Davis*, 12 Id. 353; *Newman v. Samuels*, 17 Id. 528. If there is an omission in the certificate as to who executed the deed, it is held fatal in *Buell v. Irwin*, 24 Mich. 145, where the certificate stated that the grantor "acknowledged that ——— executed the said deed," etc., leaving a blank before the word "executed." The omission of the words "for the uses and purposes," or "the consideration and purposes therein set forth," in a certificate of acknowledgment, is held to be fatal in Arkansas, where no equivalent words are used and an acknowledgment that the instrument is the party's "act and deed,"

is not sufficient: *Jacoway v. Gault*, 20 Ark. 190; *Little v. Dodge*, 32 Id. 453. So in the case of an acknowledgment by a *feme covert*, because, it is said, those words are necessary to show that the nature and effect of the conveyance have been explained to her: *Little v. Dodge*, *supra*. But the omission of the word "consideration," in the expression, "for the consideration and purposes," etc., prescribed in the statutory form, is held not to be fatal in *Monroe v. Arledge*, 23 Tex. 478.

WHERE A JUSTICE OF THE PEACE IS REQUIRED TO ENTER the taking of an acknowledgment in his docket, and it is so entered, the omission to state that fact in the certificate does not vitiate it: *Schroder v. Keller*, 84 Ill. 46; *Harvey v. Dunn*, 89 Id. 585.

ACKNOWLEDGMENTS BY MARRIED WOMEN—SUBSTANTIAL COMPLIANCE WITH STATUTE.—A married woman's acknowledgment is something more than an authentication of her deed. It is generally regarded as an essential part of the deed. She can not convey without it: *Mariner v. Saunders*, 5 Gilm. 118; *Mason v. Brock*, 12 Ill. 273; *Martin v. Dwelly*, 21 Am. Dec. 245. It is, therefore, even more necessary than in the case of a conveyance by a party *sui juris* that the requirements of the statute in taking a *feme covert's* acknowledgment should be fully complied with, and that the certificate should in general show such compliance: *Watson v. Bailey*, 2 Am. Dec. 462; *Evans v. Commonwealth*, 8 Id. 711; *Watson v. Mercer*, 9 Id. 411; *Jourdan v. Jourdan*, 11 Id. 730, note; *Lane v. Dolick*, 6 McLean, 200; *Landers v. Bolton*, 26 Cal. 408; *Ewald v. Corbett*, 32 Id. 493; *Lindley v. Smith*, 46 Ill. 523; *Pribble v. Hall*, 13 Bush, 61; *Johns v. Reardon*, 11 Md. 465; *Chauvin v. Wagner*, 18 Mo. 531; *Wamsell v. Kern*, 57 Id. 478; *Ward v. McIntosh*, 12 Ohio St. 231; *Good v. Zercher*, Id. 384; *Dengenhart v. Cracraft*, 36 Id. 549; *Henderson v. Rice*, 1 Coldw. 224; *Laird v. Scott*, 5 Heisk. 314; *Harston v. Doe*, 12 Leigh, 445; *Grove v. Zumbro*, 14 Gratt. 501. But though compliance with all the requirements of the statute is necessary to give validity to the act, it is not meant that the very letter of the statute must be pursued. Substantial compliance is all that is required: *Hollingsworth v. McDonald*, 3 Am. Dec. 545; *McIntire v. Ward*, 6 Id. 417; *Dundas v. Hitchcock*, 2 How. (U. S.) 256; *Talbot v. Simpson*, 1 Pet. C. C. 188; *Tubbs v. Gatewood*, 26 Ark. 123; *Little v. Dodge*, 32 Id. 453; *Goode v. Smith*, 13 Cal. 81; *Hughes v. Lane*, 11 Ill. 123; *Stuart v. Dutton*, 39 Id. 91; *Owen v. Norris*, 5 Blackf. 479; *Pardun v. Dobeberger*, 3 Ind. 389; *Reynolds v. Kingsbury*, 15 Iowa, 238; *Nantz v. Bailey*, 3 Dana, 111; *Martin v. Davidson*, 3 Bush, 572; *Young v. State*, 7 Gill & J. 253; *Bernard v. Elder*, 50 Miss. 336; *Allen v. Lenoir*, 53 Id. 321; *Den v. Geiger*, 9 N. J. L. (4 Halst.) 225; *Thayer v. Torrey*, 37 N. J. L. 339; *Meriam v. Harsen*, 2 Barb. Ch. 232; *Den ex dem. Hathaway v. Davenport*, 2 Jones' L. 152; *Brown v. Furrar*, 3 Ohio, 140; *Kottman v. Ayer*, 1 Strobb. 552; *Langhorne v. Hobson*, 4 Leigh, 224.

IDENTITY OF FEME COVERT MUST APPEAR by the certificate in the same way as if she were *sui juris*: *Gove v. Oather*, 23 Ill. 634; *Lindley v. Smith*, 46 Id. 523; *Reynolds v. Kingsbury*, 15 Iowa, 238; *Garnier v. Barry*, 28 Mo. 438. But in Tennessee, where the wife's acknowledgment was taken at a different time from that of her husband, it was held that under the statute the officer need not certify that she was personally known to him: *Mount v. Kesterson*, 6 Coldw. 452. If the wife's name is omitted, a blank being left where it should appear, it is fatal, unless the context will supply the omission. Thus, where the certificate stated that the grantor and his wife appeared and acknowledged the deed and then proceeded, "And the said —, wife of said —, having been by me examined apart," etc., it was held that

the defect was fatal, because, as to her, this latter was the vital part of the certificate: *Merritt v. Yates*, 71 Ill. 636; S. C., 22 Am. R. 123. It is not easy to see, however, why the former part of the certificate might not have been resorted to to cure the defect.

PRIVATE EXAMINATION.—In most of the states it is essential to the validity of a married woman's acknowledgment that she should be examined separately and apart from her husband, or privily. This, where it is required, is an essential feature of a *feme covert's* acknowledgment, and the certificate must in general show the fact of such an examination, or it will be valueless: *Jourdan v. Jourdan*, 11 Am. Dec. 724; *Philips v. Green*, 13 Id. 124; *Tate v. Stoolzfoss*, 16 Id. 546; *Elliott v. Peirsol*, 1 Pet. 328; *Stillwell v. Adams*, 29 Ark. 346; *Kendall v. Miller*, 9 Cal. 591; *Hartley v. Ferrell*, 9 Fla. 374; *Garrett v. Moss*, 22 Ill. 363; *Board of Trustees v. Davidson*, 65 Id. 124; *Jordan v. Corey*, 2 Ind. 385; *Steele v. Lewis*, 1 T. B. Mon. 48; *McGann v. Edwards*, 6 B. Mon. 208; *Sibley v. Johnson*, 1 Mich. 380; *Dewey v. Campan*, 4 Id. 565; *Edgerton v. Jones*, 10 Minn. 427; *Russ v. Wingate*, 30 Miss. 440; *Willis v. Gattman*, 53 Id. 721; *Den ex dem. Etheridge v. Ashbee*, 9 Ired. L. 353; *Harty v. Ladd*, 3 Or. 353; *Rice v. Peacock*, 37 Tex. 392; *Pratt v. Battels*, 28 Vt. 685; *Laughlin v. Fream*, 14 W. Va. 322. Parol evidence is not admissible to supply the defect: *Elliott v. Peirsol*, 1 Pet. 328; *Harty v. Ladd*, 3 Or. 353; *Jourdan v. Jourdan*, 11 Am. Dec. 724. In some of the states a private examination of the wife is not required, or is required only to relinquish dower, or only where the wife's own land is to be conveyed. It is proposed in this note, however, to refer only to those cases where it is required. In cases where the wife has only an inchoate right of dower, the general rule is that if the conveyance is well acknowledged by the husband, though the wife is not privately examined, it may be admitted to record and is effectual for every purpose except to bar dower: *Catlin v. Ware*, 9 Mass. 218; *Ayres v. McConnell*, 2 Scam. 30. In Illinois, Indiana, and Ohio, under former statutes, where a private examination of the wife was required, but the officer was required to certify only the fact of acknowledgment, nothing being said as to whether or not he should state the facts as to the examination, it was held that the certificate need not show such private examination, the presumption being that the officer did his duty: *Coleman v. Billings*, 89 Ill. 183; *Jordan v. Corey*, 2 Ind. 385; *Fleming v. Potter*, 15 Id. 486; *Ruffner v. McLenan*, 16 Ohio, 639. And this is held to be so now under the New York statute: *Allen v. Reynolds*, 36 N. Y. Super. Ct. (4 Jones & S.) 297. The better doctrine is, however, as it seems to us, that if the statute requires a private examination, it ought to be stated to have been made. If the fact of such an examination is stated, it will be presumed that it was conducted according to law: *Blackburn v. Pennington*, 8 B. Mon. 217. But if the certificate shows that the husband was present, it is fatal: *Allen v. Shortridge*, 1 Duv. 34.

The courts of some of the states are exceedingly strict in requiring compliance with the provisions of the statute as to the private examination of the wife. Thus, where the statute used the words "separately and apart," it was held that the use of the word "apart" without "separately" was not enough: *Dewey v. Campan*, 4 Mich. 565; *Rice v. Peacock*, 37 Tex. 392. In the latter case indeed the court seems to have been exceedingly critical in scrutinizing the certificate for defects, holding it insufficient because, among other things, it did not state that the examination was made by the officer, or that the acknowledgment was made to him. On the other hand a certificate not showing by whom or in what court a wife was privately examined in the case of an acknowledgment purporting to have been made in open court, was sup-

ported in *Whitehurst v. Hunter*, 2 Hayw. 401. In some other cases also a very stringent rule is laid down. Thus, in *Sibley v. Johnson*, 1 Mich. 380, and *Warren v. Brown*, 25 Miss. 86, it was held that a certificate stating the wife to have been examined "separate and apart from her husband" was defective, because it did not also state that it was a "private examination," as provided in the statute. This would imply that to constitute a private examination in the sense of the statute it must be made apart from other persons as well as from the husband. This is, however, to depart entirely from the reason of the rule requiring a private examination, which is merely to prevent coercion or intimidation by the husband. The doctrine of the great majority of the cases is, that it is sufficient to state that the examination was separate and apart from the husband where the statute requires a private examination: *Dennis v. Tarpenay*, 20 Barb. 371; *Thayer v. Torrey*, 37 N. J. L. 339; *Love v. Taylor*, 26 Miss. 567, overruling *Warren v. Brown*, *supra*. So a requirement that the wife should be examined "privily and apart from her husband" is satisfied by a certificate showing a "private examination:" *Den ex dem. Skinner v. Fletcher*, 1 Ired. L. 313. Stating the examination to have been "separate and apart" from the husband is sufficient without using also the words "out of the presence" of the husband, contained in the statute: *Nippel v. Hammond*, 4 Col. 211. So a certificate of an examination separate and apart from the husband, or a private examination, satisfies a requirement that it shall be "apart from and without the hearing of the husband:" *Pardue v. Debeberger*, 8 Ind. 889; *Webster v. Hall*, 1 Am. Dec. 370. So, where the statute requires an examination "out of the presence" of the husband, and the certificate states the wife to have been "privately examined apart from and out of the hearing" of the husband: *Deery v. Cray*, 5 Wall. 795. To constitute a private examination, the husband should be so far removed as not to be able to see or hear what is going on: *McOandless v. Eagle*, 51 Pa. St. 309. If a private examination is certified, it is not indispensable, it seems, that the acknowledgment shall be stated to have been privately made: *Kennedy v. Price*, 57 Miss. 771.

MUST SHOW ACT VOLUNTARY AND WITHOUT COMPELSION.—The statutes generally require that a married woman shall acknowledge that she executed the deed voluntarily and without coercion; although the terms used are not always the same. This also is matter of substance, and must appear from the certificate, either in the words of the statute or equivalent words: *Stillwell v. Adams*, 29 Ark. 346; *Garrett v. Moss*, 22 Ill. 363; *Gill v. Funtleroy*, 8 B. Mon. 177; *Blackburn v. Pennington*, Id. 217; *Louden v. Blythe*, 27 Pa. St. 22; *Mount v. Kesterson*, 6 Coldw. 452; *Pratt v. Battels*, 28 Vt. 685; *Bartlett v. Fleming*, 3 W. Va. 163; *Den ex dem. Jones v. Lewis*, 8 Ired. L. 70; *Den ex dem. Lucas v. Cobbs*, 1 Dev. & B. L. 228. Stating that there was a "satisfactory" private examination, is not sufficient: *Den ex dem. Jones v. Lewis*, 8 Ired. L. 70. So stating that the wife acknowledged the instrument to be her act and deed, and did not wish to retract it, is not enough to supply the omission of the words "willingly executed:" *Leftwich v. Neal*, 7 W. Va. 569. So a statement that she "desired" the acknowledgment to be certified: *Bartlett v. Fleming*, 3 Id. 163. So a statement that she acknowledged it to be her act and deed "in due form" does not supply the omission of "voluntarily:" *Den ex dem. Lucas v. Cobbs*, 1 Dev. & B. L. 228. The statement that the wife acknowledged the instrument to be her "voluntary act and deed," or that she "voluntarily consented" thereto, or the like, has been held sufficiently to import that it was without coercion or compulsion of the husband, as prescribed by statute: *Brown v. Farran*, 3 Ohio. 140; *Shaller v.*

Brand, 6 Am. Dec. 432; *Stevens v. Doe*, 6 Blackf. 475. But the contrary is held in Tennessee: *Henderson v. Rice*, 1 Coldw. 223. In that state, indeed, it is intimated in one case that the omission of the word "voluntarily" would be fatal, though the words "freely, without compulsion, restraint, or coercion" were used, because the statutory form made all those words necessary: *Laird v. Scott*, 5 Heisk. 314. If the point had been necessary to be decided, the court probably would not have gone that length. The omission of the word "voluntarily" was held immaterial where the words "freely" and "without threats," etc., were used: *Battin v. Bigelow*, 1 Pet. C. C. 452. So where both "freely" and "voluntarily" were omitted, but the words "without any fear, threats, or compulsion," were used: *Allen v. Lenoir*, 53 Miss. 321. Substantially to the same effect are *Meriam v. Harsen*, 2 Barb. Ch. 232; *Dennis v. Tarpenny*, 20 Barb. 371; *Bernard v. Elder*, 50 Miss. 336; *Tubbs v. Gatewood*, 28 Ark. 128; *Little v. Dodge*, 32 Id. 453; *Belcher v. Weaver*, 46 Tex. 293; S. C., 28 Am. Rep. 267, in all of which cases similar substitutions for the words "voluntarily," "freely," "willingly," or "of her own free will," were allowed. The words "freely and of her own accord," are substantially equivalent to the statutory words "as her voluntary act and deed, freely:" *Dundas v. Hitchcock*, 12 How. (U. S.) 256. "Restraint" is equivalent to "constraint," in an acknowledgment: *Edmondson v. Harris*, 2 Tenn. Ch. 427. The omission of the statutory words "undue influence" is immaterial, where the deed is acknowledged to have been executed "freely and voluntarily," and "without fear or compulsion:" *Goode v. Smith*, 13 Cal. 81. But the omission of the words "ill usage" was held fatal, where the deed was acknowledged by a *feme covert* to have been executed "of her own free will, and not through any threats of her said husband, or fear of his displeasure:" *Hawkins v. Burress*, 1 Harr. & J. 513. So the omission of the word "fear," where the statute required her to acknowledge that she executed the instrument "as her voluntary act and deed freely, without any fear, threats, or compulsion of her said husband," and the certificate stated that she acknowledged that she executed it "on her own will and accord, and without any force, persuasion, or threats of her said husband:" *Boykin v. Rain*, 28 Ala. 332; *Alabama Life Ins. etc. Co. v. Boykin*, 38 Id. 510. These last three cases are certainly not in accord with the general spirit of the authorities on this subject. Of course, where there is nothing to supply the place of it, the omission of the word "fear" will be fatal: *Hollingsworth v. McDonald*, 3 Am. Dec. 545. Where the word "husband" is omitted in the phrase "undue influence of her said husband," it is a mere clerical error: *Gorman v. Stanton*, 5 Mo. App. 585. Omitting the words "her act and deed," in a *feme covert's* acknowledgment is immaterial, as the acknowledgment that she executed it sufficiently imports it: *Stuart v. Dutton*, 39 Ill. 91; *Solyer v. Romanet*, 52 Tex. 562.

NECESSITY OF EXPLAINING CONTENTS OF DEED TO FEME COVERT.—In some of the states the statutes require that in case of an acknowledgment by a married woman, the contents of the deed shall be explained or made known to her at the time of acknowledging it. This also is in such states regarded as an essential requirement, and substantial compliance with it must be shown by the certificate: *Barnet v. Barnet*, 16 Am. Dec. 516; *Pease v. Barbieri*, 10 Cal. 436; *O'Ferrall v. Simplot*, 4 G. Greene, 162; S. C., 4 Iowa, 381; *Moorman v. Board*, 11 Bush, 135; *Baleman's Petition*, 11 R. I. 393; *Hairston v. Doe ex dem. Randolph*, 12 Leigh, 445. Under the statute of 1818, in Indiana, it was required that the deed should be read or its contents otherwise made known to the wife, but as the officer was not expressly directed to

certify the fact that he had done so it was held not to be necessary that he should so certify, but that the presumption was that he had done so if the certificate was otherwise regular: *Stevens v. Doe*, 6 Blackf. 475. Under a similar statute in Kentucky, the same doctrine was held: *Gregory v. Ford*, 5 B. Mon. 471. The Ohio courts, in construing a similar statute, held, for a time, that the fact that the deed was explained or made known, must appear from the certificate: *Connell v. Connell*, 6 Ohio, 358; *Good v. Zercher*, 12 Id. 364; *Meddock v. Williams*, Id. 336; *Silliman v. Cummins*, 13 Id. 116. But these cases were subsequently overruled: *Thesnut v. Shane*, 16 Id. 599; *Card v. Patterson*, 5 Ohio St. 319. Where the fact that the contents of the deed were made known or explained is required to be shown by the certificate, substantial compliance is undoubtedly sufficient. If the certificate shows that she was acquainted with the contents of the instrument, it is enough: *Talbot v. Simpson*, 1 Pet. C. C. 188; *Jansen v. McOahill*, 22 Cal. 563; *Nippel v. Hammond*, 4 Col. 211; *Hughes v. Lane*, 11 Ill. 123; *Martin v. Davidson*, 3 Bush, 572; *Moorman v. Board*, 11 Id. 135; *Chauvin v. Wagner*, 18 Mo. 531; *Thomas v. Meier*, Id. 573; *Kavanagh v. Day*, 10 B. I. 393. Where the certificate stated that the wife declared that she relinquished "her right of inheritance to the land contained" in the deed, it was held to warrant the presumption that it was explained to her: *Nantz v. Bailey*, 3 Dana, 111. The contents of the deed may be made known by signs where the wife is deaf and dumb: *In re Harper*, 6 Man. & G. 732; S. C., 7 Scott (N. R.), 431; or through a duly sworn interpreter, if she is unacquainted with the language: *Norton v. Meader*, 4 Saw. 603. Otherwise if there is no authority to swear an interpreter: *Dewey v. Campau*, 4 Mich. 565. It is no objection that the explanation is given in the husband's presence: *Moorman v. Board*, 11 Bush, 135. In Tennessee the statute requires the certificate of a married woman's acknowledgment to show that she executed the deed "understandingly," and that is an indispensable requisite, though that precise word need not be used: *Anderson v. Bewley*, 11 Heisk. 29; *Wright v. Duffield*, 58 Tenn. (2 Baxter), 218.

STATEMENT THAT WIFE DOES NOT WISH TO RETRACT her deed is in some states made an essential part of the acknowledgment, and the omission of it is fatal: *Landers v. Bolton*, 26 Cal. 408; *Chauvin v. Wagner*, 18 Mo. 531; *Le Bourgeois v. McNamara*, 5 Mo. App. 576; *Bateman's Petition*, 11 B. I. 585; *Grove v. Zumbro*, 14 Gratt. 501; *Linn v. Patton*, 10 W. Va. 187; *Belcher v. Weaver*, 46 Tex. 293; S. C., 26 Am. Rep. 267. In Illinois, under a former statute, although it was necessary that it should appear to the officer that a *feme covert*, appearing to acknowledge a deed, did not wish to retract it, it was held not essential to state it in the certificate: *Hughes v. Lane*, 11 Ill. 123. Otherwise, under a similar statute in Missouri: *Chauvin v. Wagner*, 18 Mo. 531; *Le Bourgeois v. McNamara*, 5 Mo. App. 576. Using the word "contract" for "retract" does not vitiate the acknowledgment: *Belcher v. Weaver*, 46 Tex. 293; S. C., 26 Am. Rep. 267. In Ohio it is necessary that the certificate of a *feme covert's* acknowledgment should state that she is still satisfied with the deed: *Ward v. McIntosh*, 12 Ohio St. 231. In North Carolina the omission of the statutory words "doth now voluntarily assent thereto" is immaterial where a voluntary execution is stated: *Den ex dem. Etheridge v. Ferebee*, 9 Ired. L. 312.

EXPRESS RELINQUISHMENT OF DOWER is required in some states to be inserted in a married woman's acknowledgment to bar dower, the mere acknowledgment of execution not being sufficient: *Lindley v. Smith*, 46 Ill. 524; *Becker v. Quigg*, 54 Id. 390; *Thomas v. Meier*, 18 Mo. 573. A relinquish-

ment of dower in an acknowledgment of a deed of the wife's own land does not vitiate it, if otherwise perfect, being rejected as mere surplusage: *Hartley v. Ferrell*, 9 Fla. 374; *Chester v. Rumsey*, 26 Ill. 97; *Moore v. Tipton*, 33 Id. 358; *Stuart v. Dutton*, 39 Id. 91; *Tourville v. Pierson*, Id. 446; *Stone v. Montgomery*, 35 Miss. 83; *Chauvin v. Wagner*, 18 Mo. 531; *Delassus v. Poston*, 19 Id. 425; *Perkins v. Carter*, 20 Id. 465; *Barker v. Circle*, 60 Id. 258. *Contra*, *McDaniel v. Priest*, 12 Id. 544; *Lane v. Dolick*, 6 McLean, 200.

AMENDMENT OF CERTIFICATE.—In some cases it has been held that an officer may amend his certificate where it fails to set forth the facts of the acknowledgment, or even that he may be compelled to do so by mandamus: *Jordan v. Corey*, 2 Ind. 385; *Wannall v. Kern*, 51 Mo. 150. *Contra*, *O'Ferrall v. Simplot*, 4 Iowa, 381; *Merritt v. Yates*, 71 Ill. 636; S. C., 22 Am. Rep. 123. He may do so under the statute in Ohio and Tennessee: *Kilbourn v. Fury*, 26 Ohio St. 153; *Fall v. Roper*, 3 Head, 485. As to the power of a court of equity to perfect a defectively acknowledged conveyance by a married woman, see the note to *Tiernan v. Poor*, 19 Am. Dec. 230.

PAROL EVIDENCE TO SUPPORT OR IMPRACH AKNOWLEDGMENT: See the note to *Smith v. Ward*, 1 Am. Dec. 81.

DAVIS v. HARKNESS.

[1 GILMAN, 173.]

EXPENSES OF WARD MUST BE KEPT WITHIN INCOME OF HIS ESTATE and not trench upon the capital, as a general rule at common law, though the proper court may in case of strong necessity direct an appropriation of part of the principal for that purpose.

GUARDIAN CAN NOT EXPEND WARD'S MONEY FOR MAINTENANCE WITHOUT AN ORDER of the probate court under the Illinois statute, although in case of strong necessity the court of chancery may allow him for indispensable expenses incurred without such order, even though it may be necessary to break in on the principal.

COURT OF CHANCERY WILL NOT ALLOW FOR MAINTENANCE BEYOND INCOME of an infant's estate to one who, as husband of the mother of such infant, takes possession of the whole estate and appropriates it to his own use, without any appointment as guardian and without rendering any account.

HUSBAND OF ADMINISTRATRIX IS NOT STRICTLY AN ADMINISTRATOR, so as to render a claim against him for moneys received from the intestate's estate a preferred claim against his own estate under the Illinois statute, though a court of equity may perhaps declare him so to be to carry out the intent of the statute.

CASE WITHIN THE EQUITY OF A STATUTE, though not within its letter, may be declared in a court of equity to be within the statute.

STRANGER TAKING POSSESSION OF INFANT'S ESTATE WITHOUT APPOINTMENT as guardian, merely as husband of such infant's mother who was administratrix of the father, will be held liable as guardian in a court of equity, so as to constitute the infant's claim against him a preferred claim against his estate under the Illinois statute.

BILL filed by the complainants as children and heirs of one Harkness, deceased, for an account against the defendant as administrator of one Hains. It appeared that the complainant's father died in Ohio in 1822, the complainants being then infants, aged respectively three years and one year. Hains married their mother in 1824, she being at that time administratrix of her deceased husband, the complainants' father, and received about one thousand dollars belonging to the estate of the father to which the complainants were entitled. Hains brought up the complainants in his family and maintained and educated them upon the same footing as his own children, at an annual expense for each variously estimated by witnesses at from sixty dollars to one hundred dollars. He removed with his family to Illinois in 1833 and died in 1838, and the defendant was appointed his administrator, and had in hand assets exceeding the amount claimed by the complainants, but not enough to pay that and all other claims against Hains' estate. Hains had no property when he married the complainants' mother, and had never rendered any account of the moneys received of Harkness' estate. The defendant claimed that he should be allowed for the maintenance and education of the complainants, and it appeared in evidence that Hains intended to charge for the same. The court below held that Hains was entitled to the expense of such maintenance and education only to the extent of the interest of the money to the time of his death, and decreed in favor of the complainants for the sum received by Hains, with interest thereon from the time of his death, and directed payment of the same out of Hains' estate, as a claim of the third class under the statute of wills, and the defendant brought error. The questions to be determined appear from the opinion.

W. Colton and E. D. Baker, for the plaintiff in error.

S. T. Logan and A. Lincoln, for the defendants in error.

By Court, CARON, J. Two questions are to be determined in the decision of this case. First, whether the complainants below are entitled to any decree against the estate of his plaintiff's intestate; and second, if they are, whether the amount allowed them shall be placed in the third classification, as was decreed below. Whether the plaintiff's intestate came into possession of the complainant's estate as executor, administrator, guardian, or trustee, the plaintiff can not complain, if we apply the same rule that we would in case of a legally constituted guardian in

determining his right to break in upon the infants' estate for their maintenance and support.

It is a general rule of the common law, that the expenses of the infant, or ward, shall be kept within the income, or produce, of his estate, although the court of chancery, or other proper court, has frequently, in cases of strong necessity, upon proper application, ordered a portion of the principal to be appropriated in that way; but in doing this, they have always proceeded with great caution, and have only done it in urgent cases. The inducements for guardians to invent for their wards artificial wants, that they may reap an incidental benefit in the expenditure of their estate, has admonished the courts to guard, with a jealous eye, the estates of infants, who are unable to protect themselves. Without this the ward would but too often become the victim of the guardian, and the most ample estate would, during a protracted minority, become dissipated more to his advantage than that of his ward. In view of this danger, and for the purpose of tying the hands of guardians as far as possible against improvident expenditures, the legislature had directed, that the expenditure shall be made under the order and direction of the court of probate. The statute says: "The guardian shall have power, under the direction of the court of probate, to superintend the education and nurture of the ward, and for that purpose may pay out such portion of the ward's money as the court of probate shall from time to time by order direct; provided, that the rents and profits arising from his real estate, and next the interest on the ward's money, shall always be first resorted to for the education and nurture of the ward:" R. L. 455, sec. 10; Gale's Stat. 466. This statute very wisely concludes the right of the guardian to expend any of the ward's money for any purpose, without first obtaining an order of the court of probate, and as that court is always open, and its proceedings summary, and not expensive, but little or no inconvenience can result from this provision, and nothing compared with the security which it must afford, if properly observed. The ward would be without protection, if the guardian were allowed to go on from year to year, without rendering any account, trusting in the end to get his charges allowed upon the gross estimates of witnesses. Such a proceeding is too suspicious to receive the sanction or encouragement of this court.

That the courts of chancery have a right, in peculiar cases, to allow a guardian for indispensable expenses incurred on account of the ward, although they may break in upon the prin-

cial estate, and no previous order of the court has been obtained, can not be doubted; but it will only be done in very extraordinary cases, where a strong necessity for the expenditure is shown, and a satisfactory reason given why a previous order was not obtained. When a guardian disregards the directions of the law, he must expect his conduct to be looked upon with jealousy; and that he will receive favors with a reluctant discretion.

Now what is this case? While these complainants were yet in early infancy, Hains married their mother in 1824, who, as administratrix of their father, was in possession of their estate which thereby fell into his hands. This was in the state of Ohio, whence in 1833 he removed to this state, bringing them with him. They continued to reside in his family till the time of his death, in 1838. Neither while he resided in Ohio, nor after he came to this state, did he ever render any account of his trust, whatever it might be, nor did he ever let it be known to the proper authorities, that he had any money belonging to the minors in his hands; but, on the contrary, he secretly appropriated the whole to his own use, preserving no account of it in any way, nor did he keep any account of the expenses and outlays. The whole transaction, if not an outrage on the law, and the rules of propriety, is at least very suspicious, and demands a rigid scrutiny before any allowance is made, even from the interest, which should be allowed on their estate in his hands. His case is very different from that of a regularly appointed guardian, subject to the supervision and control of the court of probate, when the estate would have been put at a regular interest and on good security, where it would have been beyond danger of ultimate loss. Now, they are without security, subjected to the expense of a protracted litigation, and have necessarily incurred the danger of a loss of the whole, both from a want of the necessary proof to establish their demand, and from his insolvency. It was the object of the legislature, and is the desire of the court to guard against such contingencies. He can not expect the same favor and indulgence, which a regular guardian, who had observed the requirements of the law, might justly claim. To allow it to him, would be but to encourage such illegal practices. We should enforce an observance, rather than encourage a violation of the law.

It is true, that Hains did his duty faithfully, perhaps, so far as the custody, support, and education of the infants were concerned; but, at the same time, he utterly disregarded it as to

the management and security of their estate. For the former, the court may have been justified in allowing the interest on their estate; but for the latter, by all the principles of law he can not be allowed to break in upon the principal. We are, therefore, disposed to approve of the amount allowed by the court below in favor of the complainants.

The only remaining question is, whether the court below was right in giving this claim a priority in payment over ordinary creditors, out of the estate of Hains, who died insolvent. This was done under the one hundred and tenth section of the statute of wills, which provides that demands against estates shall be divided into four classes: 1. Funeral expenses, etc.; 2. Expenses of administration; 3. "Where any executor, administrator, or guardian has received money as such, his executor or administrator shall pay out of his estate the amount thus received, and not accounted for, which shall compose the third class;" and, 4. All other debts, etc. I find myself unable to make out that the husband of an administratrix is, strictly speaking, an administrator: 1. He can not administer alone, which he could do, were he an administrator; 2. He is liable for devastavit of the wife, which is not the case in general with a co-administrator: 3 Bac. Abr. 31, tit. Executors, D. 2; 3. After the death of the wife, his control over the estate ceases; 4. He is joined with the wife, rather for conformity: 1 Went. Pl. 201, note; 2 Chit. Pl. 105; 5. He is not executor *de son tort*, for he came into the possession rightfully: 3 Bac. Abr. 20; Toller on Executors, 241. There was already an administratrix: 3 Bac. Abr. 22; 1 Wms. Ex. 151.

But while I am satisfied that the plaintiff's intestate was not, strictly speaking, administrator, yet I am not prepared to say, that if driven to that extremity, to bring this case within the provisions of the statute, where it is so obviously within the intention of the legislature, that the court would not hold, that in equity he received the estate of these infants as administrator. Courts of equity are not bound down by the literal expressions of the statute; but where a case is found to be within the equity of the provision, it is held to be within the provision itself. Thus, in South Carolina, where bonded debts are entitled to a preference over simple contract debts, a bill was filed by heirs against the executors of a husband of an administratrix, who had collected debts belonging to the estate of his wife's intestate, and appropriated the proceeds to his own use, it was held that the bonded debts, which he had thus collected, should be considered as bonded debts against his estate, and have a prefer-

ence over his simple contract debts: *Gardsen's Executors v. Lord's Executors*, 1 Desau. Eq. 208. This was going as far as we should go, should we hold that the money was received by Hains as administrator. There those debts were no more bonded debts, than Hains is administrator here.

But we attain the same end by taking another view of this case, which, I think, is the proper one on which it should be decided. Authorities are not wanting to show that Hains received this money, as guardian of these infants, and as such, they may claim an account for it, if they choose. In *Newburgh v. Bickerstaffe*, 1 Vern. 296, "the lord keeper observed that Littleton says, if a man intrudes upon an infant, he shall receive the profits but as guardian, and the infant shall have an account against him in this court as against a guardian." And in the case of *Van Epps v. Van Deusen*, 4 Paige, 71 [25 Am. Dec. 516], the chancellor says: "A mere stranger, or wrong-doer, who takes possession of the property of an infant, and receives the rents and profits thereof, may, in equity, be considered as the guardian of the infant, and may be compelled to account as such."

Upon principle, too, as well as authority, should the infant be entitled to an account against him as guardian. It would be a strange rule of equity, indeed, if the infant were not as well protected against the violence of the wrong-doer, as he is against the peculations of an appointed guardian. If he receive the money of the infant, and use it, he is estopped from denying that he received it as guardian, and so is his representative. The design of the legislature in giving the priority, which is provided for in the third classification, was to protect those who were not able to protect themselves, and this case comes not only within the policy and intention of the law, but, as I have endeavored to show, within its literal construction. A construction which would exclude these complainants from the benefits of this provision, would be superficial indeed. The decree of the court below was correct, and is affirmed with costs.

Decree affirmed.

WILSON, C. J., and THOMAS, J., gave no opinion.

GUARDIAN CAN NOT USE CAPITAL OF WARD'S ESTATE for ward's subsistence, nor will he be allowed interest for moneys advanced beyond the ward's income: *MacDowell v. Caldwell*, 16 Am. Dec. 635. In *Maupin v. Dulany*, 30 Id. 699, it is held that a court of chancery will sanction such use of the ward's funds by a testamentary guardian as it would have authorized him to make upon a special application to it. See the same case as to allowances to a

guardian for clothing, subsistence, etc., furnished to the ward. In *Bond v. Lockwood*, 33 Ill. 223, the principal case is cited to the point that expenditures by a guardian from his ward's estate, except for necessities, should be approved by the court before they are made. Such expenditures, even for maintenance, will not be allowed out of the capital, except in a case of very strict necessity: *Cummins v. Cummins*, 15 Id. 34. A court of equity is general guardian of all infants within its jurisdiction: *Smith v. Sackett*, 5 Gilm. 544. As infants are incapable of protecting their own interests, they can not be guilty of laches: Id., citing the principal case.

HUSBAND OF ADMINISTRATRIX OR EXECUTRIX, POWERS AND LIABILITIES OF: See *Wiggin v. Sweet*, 39 Am. Dec. 716.

CONSTRUCTION OF STATUTE ACCORDING TO ITS EQUITY: See *Blakeney v. Blakeney*, 30 Am. Dec. 574.

STRANGER OR WRONG-DOER MAY BE CONSIDERED GUARDIAN IN EQUITY, and held to account as such where he takes possession of an infant's property without authority. A father may be compelled to account for property of his infant child of which he has enjoyed the benefit: *Van Epps v. Van Deusen*, 25 Am. Dec. 516

WALRADT v. BROWN.

[1 GILMAN, 397.]

PARTY HAVING CLAIM EX DELICTO IS "CREDITOR" WITHIN STATUTE OF FRAUDS OF ILLINOIS, avoiding sales in fraud of creditors. Hence, a sale made by a defendant in a pending suit for slander, with intent to defraud the plaintiff out of any judgment he may recover, is void as against such plaintiff.

TRESPASS *de bonis asportatis*. The nature of the case appears from the opinion. The court below, having instructed the jury that if they should find that the sale mentioned in the opinion was fraudulent, they should find for the defendants, granted a second instruction on the prayer of the plaintiff, which is stated in the opinion. The court then granted a third instruction on the prayer of the defendants, to the effect that if the sale in question was fraudulent, "it was void as to subsequent as well as antecedent debts." Verdict and judgment for the plaintiff, and the defendants appealed.

B. F. Fridley, for the appellants.

O. Peters, for the appellee.

By Court, CATON, J. James Bennett brought suit for slander to the June term, 1842, against Zalmon Young, which was tried at the September term, 1842, in which the plaintiff had judgment, on which execution was issued, and put into the hands of Walradt, sheriff of De Kalb county, who, by virtue thereof, levied on property alleged to belong to Young, and advertised

and sold the same, a part of which each of the other defendants purchased. Brown, the plaintiff below, claimed to be the owner, and brought this action for trespass, for the levy upon and sale of the goods. On the trial at the circuit, the evidence showed, that between the commencement and trial of the slander suit, the property levied upon was sold by Young to Brown, and there were many very strong circumstances proved, tending to show that the sale was not *bona fide*, but made with the intent to defraud Bennett out of whatever judgment he might recover in his suit for slander against Young. The jury found a verdict for the plaintiff. At the request of the plaintiff, the court instructed the jury, "that, although they should find the said sale to be fraudulent, yet if they found no subsisting debt due from said Young to said Bennett, they would find for the plaintiff." To this the defendants excepted, and now assign for error.

In deciding on the legality or illegality of this instruction, it is necessary that we should give a construction to our statute of frauds. The second section provides in substance, that every sale of property made to defraud creditors of their actions, debts, suits, accounts, penalties, or forfeitures, or those who shall purchase the same property, shall be from thenceforth deemed and taken only as against the person or persons, etc., whose debts, suits, demands, estates, interests, by such fraudulent sale, shall or might be in any wise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void. It is insisted that parties having claims or causes of action arising *ex delicto* are not protected by the statute, the word "creditors" alone being used; but I am now satisfied from a more careful perusal of this statute, that the word "creditors" here is not used in its strict technical sense, but that it means all parties who have demands, accounts, interests, or causes of action for which they might recover any debt, damages, penalty, or forfeiture. Such are the interests which, the statute expressly says, shall be protected, and consequently all persons having such interests must be included in the word "creditors." The words "person or persons" used in the latter part of the clause, are broad enough to extend the meaning of the word "creditors," if the intention of the legislature were otherwise doubtful.

It has always been held, that by the provisions of the statute 13 Eliz., all persons having causes of action, whether arising from tort or contract, were equally within its provisions. In that statute, the words "creditors and others" are used, and it is insisted that by omitting the words "and others," the legis-

lature intended to exclude all but technical creditors. But I find, that those words have been treated as unmeaning and useless by the English courts, for in *Cadogan v. Kennett*, 2 Cowp. 434, Lord Mansfield says: "The former of these statutes (13 Eliz.) relates to creditors only," so that he, at least, in extending the provisions of this statute to those who had causes of actions, arising *ex delicto*, must have included them within the term "creditors;" although I am aware that in some of the American courts, at least, resort has been had to the expression "and others," to protect such interests. But these statutes may be considered as rather declaratory of what the common law was, than as establishing a new principle. In the same case the court said: "The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statute of 13 Eliz." It may be, that at the common law, persons having no demands at the time, against the fraudulent vendor, and not intended at all to be affected by it, might take advantage of a fraud attempted to be perpetrated on another, who alone had a right to complain; and if so, then to that extent these statutes may be considered as restrictive, but no further. We fully agree with his lordship when he says: "These statutes can not receive too liberal a construction, or be too much extended in suppression of fraud."

I do not think that the third instruction, which was given at the request of the defendant, and which seems to be contradictory to the second, so qualified it, as not to mislead the jury. As this is sufficient to reverse the judgment, and settles the only important question of law arising in the case, it is unnecessary to look into the evidence to see whether it warranted the finding of the jury. The judgment is reversed with costs, and the cause remanded.

Judgment reversed.

PARTY HAVING CLAIM OF DAMAGES FOR TORT IS CREDITOR, under the Illinois statute against fraudulent conveyances: *Bowgard v. Block*, 81 Ill. 186, citing the principal case.

"CREDITORS" PROTECTED AGAINST FRAUDULENT CONVEYANCES, who are, in general: See *Hutchison v. Kelly*, 39 Am. Dec. 250.

TARLETON v. VIETES.

[1 GILMAN, 470.]

DEFENDANT IN EQUITY CLAIMING AFFIRMATIVE RELIEF must seek it by way of a cross-bill, but he may, in his answer, rely on any matter which shows the complainant not entitled to the relief claimed in his bill.

ANSWER IN FORECLOSURE SUIT MAY SET UP AGREEMENT SUBSEQUENT to the execution of the mortgage, whereby the mortgagee was to surrender the mortgage and notes upon a conveyance in fee of part of the premises, and show that the defendant has performed the same by executing and tendering such a conveyance, which, being refused by the complainant, is brought into court, and if the defense is sustained the bill must be dismissed, though the defendant can not, without a cross-bill, have the notes surrendered and the mortgage canceled.

DEFENSE OF STATUTE OF FRAUDS MUST BE SPECIALLY INSISTED ON in the pleadings in a suit in equity, or it will be deemed waived.

COMPLAINANT IN EQUITY RELYING ON STATUTE OF FRAUDS to defeat a defense set up in the answer, could formerly do so by a special replication, but that form of pleading is now disused, and he must now take advantage of the statute by amending his bill, so as to anticipate and avoid the defense.

GENERAL REPLICATION WAIVES BENEFIT OF STATUTE OF FRAUDS as a defense against an agreement set up in the answer.

BILL to foreclose a mortgage. Decree, *pro confesso*, for the plaintiff, and the defendant brought error. The facts appear from the opinion.

J. T. Stuart and B. S. Edwards, for the plaintiff in error.

L. W. Ross and J. Lamborn, for the defendant in error.

TREAT, J. Vietes filed a bill in chancery to foreclose a mortgage, executed by Tarleton to secure the payment of three promissory notes. Tarleton answered, admitting the statements of the bill, but alleging in substance that after the execution of the notes and mortgage, an agreement was made between the complainant and the defendant, whereby the defendant was to convey in fee to the complainant, a part of the mortgaged premises, and the complainant was thereupon to discharge the notes and cancel the mortgage; that in pursuance of the terms of this agreement, the defendant made out and tendered a deed to the complainant, who refused to receive it; whereby the defendant alleges that the notes were paid, and prays that they may be given up, and the mortgage canceled. The deed is copied into the answer, and referred to as an exhibit in the cause. It appears to be executed by Tarleton and his wife, and is regularly acknowledged. The complainant excepted to the answer, because it introduced new facts, which were the proper subject-

matter of a cross-bill. The exception was referred to the master, who reported that the same was valid, and ought to be allowed; whereupon an order was made, allowing the defendant until the first day of the next term to amend his answer and file a cross-bill. At the next term, the bill was taken for confessed, and a decree made, requiring the defendant to pay to the complainant, on or before the first day of the succeeding term, the sum of two hundred and fifty-eight dollars and eighty-seven cents, the amount found due on the notes and mortgage. From that decree Tarleton prosecutes a writ of error.

The only question raised by the assignment of errors is as to the sufficiency of the answer. In equity, a defendant may, in his answer, rely on any matter which shows that the complainant is not entitled to the relief he claims by his bill. If the defendant succeeds in establishing such a defense, there must be a denial of the relief sought, and a dismissal of the bill. He is not, however, permitted to go further than to defeat the complainant. He can use his answer for the purpose of defense, but not for the purpose of obtaining relief on his part. If he claims affirmative relief, he must seek it by way of an original or cross-bill: *Ballance v. Underhill*, 3 Scam. 453. So much of the answer, therefore, as asks for the surrender of the notes and the cancellation of the mortgage is irrelevant, and must be disregarded. This part of the answer would be the proper subject-matter of a cross-bill.

The residue of the answer is not obnoxious to the exception taken to it. Admitting its allegations to be true, the complainant is not entitled to a foreclosure of the mortgage. By the terms of the agreement disclosed in the answer, the notes and mortgage were to be fully satisfied, by the conveyance in fee to the complainant of a portion of the premises embraced in the mortgage. The answer shows a performance of this agreement on the part of the defendant, as far as it was in his power to perform. He executed the deed and tendered it to the complainant, and on his refusal to accept it, he brings it into court, and insists on the specific performance of the agreement. He has thus kept the tender good, and manifested a readiness to carry the agreement into full effect. If his defense is sustained, the deed can be withdrawn from the files, and handed over to the complainant. The defendant has done all that he can do to complete the execution of the contract. He has been prevented from consummating it by the wrongful act of the complainant. Under such circumstances, the complainant should

be required to adhere to the contract, and perform its conditions on his part. This can in effect be done in this case, by denying him any relief and by dismissing his bill. We are of the opinion that the circuit court erred in adjudging the answer to be insufficient.

It is suggested, however, that the agreement set up in the answer is void by the statute of frauds. It does not appear whether the contract was in writing, or by parol. Whether obnoxious to the statute or not, we are not now called on to decide. It is a settled principle in equity, that a party, to avail himself of the benefit of the statute of frauds, must specially insist on it. If he fails thus to rely on it, he will be deemed to have waived and renounced the advantage to be derived from its provisions: *Thornton v. Vaughan and Henry*, 2 Scam. 218; *Dyer v. Martin*, 4 Id. 146; *Story's Eq. Pl.* 590; *Cooper's Eq. Pl.* 256; *Cozine v. Graham*, 2 Paige, 177. The defendant, in order to avail himself of the benefit of the statute, must set it up by plea, or insist on it in his answer. The only difficulty is in determining how the complainant may take advantage of the statute, by applying it to a transaction first introduced into the case by the answer. The better opinion is, that he should do it by amending his bill. Formerly, when special replication was allowable, he could insist on the statute in his replication. That form of replication is now disused and superseded by the general replication, which merely puts in issue the truth of the answer. A general replication would, therefore, have the effect of waiving the benefit of the statute. Amendments of the bill have been substituted in the place of special replications. What the complainant could formerly insist on in a special replication, he may now do in an amendment to his bill. He may amend the charging part of his bill by anticipating the defense, and allege new matter in avoidance of it. He can, in this way, answer or explain any new matter disclosed by the answer. If the circumstances of the case are changed by the answer, the amendment of the bill becomes necessary, in order to shape the case accordingly: *Story's Eq. Pl.* 521, 675, 679; *Cooper's Eq. Pl.* 330-332.

The decree of the circuit court is reversed, with costs, and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

SCATES, J., dissented. THOMAS, J., gave no opinion.

AFFIRMATIVE RELIEF MAY BE AWARDED TO DEFENDANT IN EQUITY, WHEN: See *Owings' Case*, 17 Am. Dec. 311. In *Mason v. McGirr*, 28 Ill. 324, it is held, citing the principal case, that affirmative relief can not be granted to the defendant on his answer in equity, but only on a cross-bill praying relief.

COMPLAINANT DESIRING TO SET UP ANY FACTS IN AVOIDANCE of matters relied upon by the defendant in a suit in equity, where special replications are disused, may do so by proper charges in his bill, by way of anticipation, or he may introduce such facts after answer by an amendment to his bill. A general replication will not do, as it merely puts in issue the truth and sufficiency of matters stated in the answer: *White v. Morrison*, 11 Ill. 366, citing the principal case.

STATUTE OF FRAUDS MUST BE PLEADED: *Esmy v. Gorton*, 18 Ill. 486, citing *Tarleton v. Vietes*. In *Givens v. Calder*, 2 Am. Dec. 686, it is held that a defendant wishing to avail himself of the statute of frauds, is not required in his answer to confess or deny the parol agreement alleged in the bill, since the law declares it void. But in *Tulbot v. Bowen*, 10 Id. 747, it is decided that a defendant, to avail himself of the statute, in answer to a bill for specific performance, on the ground that the agreement rests in parol, must either deny the agreement or plead the statute.

CONOVER v. WARREN.

[1 GILMAN, 496.]

VENDOR OF REALTY WAIVES HIS LIEN BY TAKING SECURITY for the purchase money other than the purchaser's own obligation. The lien is, therefore, waived by taking from the purchaser notes of third persons payable to him at a future day and assigned by him to the vendor.

FAILURE TO ASSERT VENDOR'S LIEN for three years furnishes a strong presumption that it is considered waived.

BILL to enforce a vendor's lien. Bill dismissed on demurrer and the plaintiff brought error. The opinion states the facts.

W. K. Titcomb and E. Keating, for the plaintiff in error.

W. Thomas, for the defendants in error.

By Court, TREAT, J. The bill in this cause was filed in July, 1843, and sets forth substantially the following facts: In February, 1840, the complainant sold and conveyed a tract of land to Thomas Warren for the consideration of two thousand dollars. Warren gave her in payment two promissory notes, one for one thousand three hundred and seventy-five dollars, dated April 1, 1839, drawn by John F. Darby, as president of the Missouri Silk Company, in favor of Warren, and by him indorsed; the other for six hundred dollars, dated November 15, 1839, drawn by John B. Fairbanks in favor of Warren, and by him indorsed. The bill then charges, that the complainant received the notes in payment, on the representations of Warren

that the same were good, and would be paid at maturity; and not as collateral security, and in discharge of her equitable lien on the land; that the notes were worthless, and have never been paid in whole or in part. The bill further charges, that George E. Warren, in December, 1841, with full knowledge of the foregoing facts, purchased the land of Thomas Warren and received a conveyance therefor. The bill makes the Warrens defendants, and concludes with the prayer that they may be compelled to pay the notes, and in default thereof, that the land may be sold, and the proceeds applied to the payment of the purchase money. The defendants demurred to the bill. The circuit court sustained the demurrer, and dismissed the bill. To reverse that decision, this writ of error is prosecuted.

The only point in the case is, whether the bill on its face shows that the complainant has a lien on the land, for the payment of the purchase money. In the decision of this question, we do not deem it necessary to review the various decisions on the subject of the equitable lien of the vendor of real estate. The doctrine properly deducible from the leading authorities is, that the seller waives the lien, whenever he takes distinct security for the payment of the purchase money. The mere taking of the bond, bill, or note of the vendee, is not of itself regarded as an act of waiver, for such instruments are only the evidence of the debt. But the taking the bond, bill, or note of the purchaser with security is evidence that the vendor does not rely on the lien, but on the security, and extinguishes the lien. The lien is also discharged by the taking of any independent security, such as a deposit of stock, a pledge of goods, a mortgage on real or personal estate, or the responsibility of a third person: 4 Kent's Com. 153; 2 Story's Eq. Jur. 475, note 2; 2 Sug. V. and P. 59; *Brown v. Gilman*, 4 Wheat. 255; *Fish v. Howland*, 1 Paige, 20; *Williams v. Roberts*, 5 Ohio, 35.

On the principle of these authorities, we are clearly of the opinion, that the complainant is not entitled to the relief she claims by her bill. It is evident from the facts disclosed in the bill, that she waived her lien by receiving and relying on other security for the payment of the purchase money. She conveyed the land, and received in payment the promissory notes of third persons, payable at a future day, indorsed by the vendee. In so doing, she relied on, as security for payment, the responsibility of the makers of the notes, and the contingent liability of the purchaser, as the assignor of the notes. If she had taken, as security for the payment of the purchase money, the responsi-

bility of the makers of the notes, her lien would have been extinguished. The fact that the responsibility of the vendee was superadded, makes it the more manifest that she relied on the notes, and not on the land for security. These facts of themselves fully discharged the lien, unless there was at the time an express reservation of it. Again, she permitted more than three years to elapse before she made any attempt to assert a lien on the land. This long delay, wholly unaccounted for, furnishes a strong presumption, that the lien was considered as waived. It is true the bill alleges that she did not intend to discharge the lien, but the facts stated in the bill are inconsistent with the truth of this allegation. The further allegation, that the notes were received on the representations of Warren that they were good, when in fact they were worthless, does not change the character of the case. This allegation may be true, and yet the complainant may have entirely renounced her equitable lien. Whether the security was valueless or not, she nevertheless at the time relied on it, and not on the land. She does not charge that Warren acted in bad faith, in making the representations. If he had made them with a fraudulent intent, and thereby injured her, another question might arise. These equitable liens on real estate are generally unknown to the world, and frequently operate injuriously on the rights of creditors and purchasers, and ought not to be enforced but in cases, where the right is clearly and distinctly made out.

On the whole case, we are fully satisfied with the decision of the circuit court, and its decree is affirmed with costs.

Decree affirmed.

VENDOR'S LIEN, WAIVER OF: See the note to *Schnobly v. Ragan*, 28 Am. Dec. 199, in which the prior cases in this series on that subject are collected. See also *Marshall v. Christmas*, 39 Id. 199; *Hall v. Olick*, Id. 327, and the notes thereto. Other cases relating to the vendor's lien are *Clarke v. Curtis*, 37 Id. 625, and *Briggs v. Hill*, 38 Id. 441. And see the notes to those cases. That the vendor waives his lien either by an express agreement to that effect or by taking real or personal security for the purchase money, such as a mortgage or the purchaser's note with surety, or a third person's note, is held, citing the principal case, in *Griffin v. Blanchard*, 17 Cal. 74; *Trustees v. Wright*, 11 Ill. 606; *Richards v. Leaming*, 27 Id. 432; *Cool v. Varnum*, 37 Id. 185; *McLaurie v. Thomas*, 39 Id. 294; *Boynton v. Champlin*, 42 Id. 64, 65; *Kirkham v. Boston*, 67 Id. 603. As where the conveyance is to a married woman, and her husband's note is taken for the purchase money: *Andrews v. Coleman*, 82 Id. 27. So the lien is waived by retaining the title bonds as security: *Warner v. Scott*, 63 Id. 372. Similarly a material-man's lien is waived by taking security: *Kinzey v. Thomas*, 28 Id. 505

PLUMLEIGH v. DAWSON.

[1 GILMAN, 544.]

TO PROVE DAMAGE FROM DIVERSION OF WATERCOURSE a plaintiff suing therefor may introduce evidence of the cost of constructing the defendant's mill on the same stream, and of the yearly rent of the mill, to show at what expense he, the plaintiff, might make the water available.

RIPIARIAN PROPRIETOR HAS RIGHT TO USE OF STREAM flowing through his land for culinary, agricultural, and hydraulic purposes without adulteration, diminution, or alteration, except from detention for lawful purposes by other proprietors above him.

DIVERSION OF WATERCOURSE by a riparian proprietor, without returning it to its natural channel before reaching the land of a proprietor below, is unlawful and subjects the wrong-doer to an action for damages by the lower proprietor.

PROPERTY IN STREAM IS INDIVISIBLE, each proprietor being entitled to the use of the whole of it as it flows through his land, and one proprietor can not appropriate a specific portion of it to his use to the exclusion of those below him.

DAMAGE IS PRESUMED FROM A DIVERSION OF A STREAM.

NEW TRIAL TO ENABLE PARTY TO RECOVER NOMINAL VINDICTIVE DAMAGES will not ordinarily be granted, but it is otherwise where the action is brought to try a question of permanent right.

CASE for diversion of a stream. Verdict and judgment for the defendant, and the plaintiff brought error. The case appears from the opinion.

I. N. Arnold, for the plaintiff in error.

O. Peters and E. E. Harvey, for the defendant in error.

By Court, SCATES, J. Case, for diverting a stream, called "Crystal Lake Outlet," from plaintiff's land. Defendant, Dawson, pleaded the general issue, to which there was a replication to the country; also a special plea that he was owner of a tract of land above the land of the plaintiff, embracing the said stream, upon which he erected a dam, and upon it cut a race, through which he turned the waters of the stream to his mill below, on his own land, leaving enough water passing along the natural channel for all reasonable uses and useful purposes of the plaintiff, and so doing no injury to the plaintiff. The plaintiff traversed the ownership of the land above him on the stream being in the defendant, and also the averment of his receiving no injury by the diversion and issue to the country.

Upon the trial the plaintiff showed title to his premises as alleged. It also appeared that the stream was about one rod wide, and about one foot in depth; that its fall from where it entered to where it left plaintiff's land, was about four feet

four inches, and runs quick. Dawson built a dam above plaintiff's land, and cut a race to his mill, and then returned the water to its former channel, below plaintiff's land. About three fourths of the water runs through the race. There is enough still passing the natural channel for agricultural and domestic uses. The plaintiff's witnesses set an average damage done to the plaintiff by diverting the stream at five hundred dollars, partly in the beauty of the stream, partly in the salability of the property, and partly in the loss of the water power. The last item is fixed at one hundred and fifty dollars in making up the estimate; and if only half the stream belonged to plaintiff, then at half that sum, though they state that half the water would be useless as a power, and that item should then be stricken out of the estimate. The defendant's witnesses, and of equal number, do not think plaintiff at all injured by diverting the water; and a part of them, who were millwrights, state that it would cost the plaintiff more to make the water available as a power, than it would be worth in its use, and so conclude, as their opinion, that he is not injured. The plaintiff asked questions, and proposed to show the cost of constructing the mill and race of defendant, and the yearly value of the mill, for the purpose of showing at what cost and of what value he might make the power available to him. The court excluded this evidence by an instruction to the jury, and plaintiff excepted; and also to the second, third, and fourth instructions.

The second instruction was, that if the jury believe, from the evidence, that the diversion of the watercourse by the defendant did not damage the plaintiff, up to the time of commencing this suit, they ought to find for the defendant; 3. That plaintiff can only recover such damages as he sustained up to the time of commencing this suit, by reason of the diversion of the water from its original channel, under all the circumstances; 4. That although the defendant may not have shown any right by title deeds, to the land on the opposite shore, yet, if the plaintiff is not damaged by diverting the water from the stream passing through his land, the jury ought to find for defendant. The jury found the defendant not guilty. A motion for a new trial was overruled, to which plaintiff excepted. These several decisions and instructions are assigned for error.

For the purpose of showing the value of the water power to the plaintiff, and at what expense it might be made available, he offered to prove the cost of construction of defendant's works, and the value of the yearly rent of his mill. This evidence, I

think, was pertinent as tending to establish a material fact, to wit, the amount of damage, by deprivation of the stream. Some of the defendant's witnesses had given an opinion, that the use of the water was valueless to the plaintiff as an hydraulic power, on account of the great expense in constructing the necessary works to make it available. The jury, having a description of the land over which defendant's race runs, and the fall at, and situation of his mill, with the cost of construction, and its yearly value, might much more readily arrive at a proper estimate of the yearly value of this stream to the plaintiff for hydraulic purposes, when informed of the character of the surface of his land, over which a race should run, the fall at, and situation for a mill upon his premises.

This evidence should have gone to the jury, not as a rule of damages, but as tending to show that the stream, which had been diverted, might be made valuable as a power, and that by its diversion, he was damaged. The instruction excluding it is error. The instructions seem to proceed upon the ground that the plaintiff must prove a special damage, to entitle him to a recovery for a diversion. I apprehend that this is an erroneous principle. A watercourse begins *ex jure naturæ*, and having taken a certain course naturally can not be diverted: *Shury v. Piggot*, 8 Bulst. 839. *Aqua currit et debet currere: Merritt v. Parker*, 1 Coxe, 460; so that all, through whose land it naturally flows, may enjoy the privilege of using it for culinary, agricultural, and hydraulic purposes, without adulteration, diminution, or alteration, except so far as it may suffer that diminution by detention for lawful uses above. Every riparian proprietor has an undoubted right to use it for hydraulic purposes, yet he must so use it as to do no injury to any other riparian proprietor; for no one has, strictly speaking, a property in the water itself, but a simple use of it, and this is the necessary result of the perfect equality of rights among all the proprietors, of that which is common to all: *Tyler v. Wilkinson*, 4 Mason, 400. The water power to which the riparian proprietor is entitled, consists in the fall of the stream, when in its natural state, as it passes through his land, or along the boundary of it; or, in other words, it consists of the difference of level between the surface where the stream first touches his land, and the surface where it leaves it: *McCalmont v. Whitaker*, 8 Rawle, 84 [23 Am. Dec. 102]. And he must allow it to pass from his land in its accustomed channel. These general principles seem to be the law in England, Scotland, and the United States: Angell

on Watercourses, 11-20, sec. 8, and authorities there referred to. It is, therefore, illegal to divert a watercourse, without returning the water to its natural channel before it reaches a riparian proprietor below: *Id.* 18; *Bealey v. Shaw*, 6 East, 208; *Brown v. Best*, 1 Wils. 174; *Colburn v. Richards*, 13 Mass. 420 [7 Am. Dec. 160].

The property in the water is indivisible. The opposite or other proprietors in common, must use it as an entire stream, or whole, in its natural channel or body, for there can be no severance into parts in its use for hydraulic purposes, at least without consent: *Angell on Watercourses*, 14; *Vandenburg v. Van Bergen*, 18 Johns. 215; *Webb v. Portland Manufacturing Co.*, 8 Sumn. 189; before Justice Story, in 1838. The defendant, therefore, had no right to take three fourths or any other specific proportion of the water as his share, and divert it from the plaintiff's land. He had a right, if he owned the land above, to erect a dam and hydraulic works, and use the whole stream to propel his mill, doing no unnecessary damage to a lower proprietor, but permitting the water to flow to him in its accustomed channel. He is allowed a reasonable use. "There may be a diminution in quantity, or retardment, or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the use of the common right." And if not "positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all:" *Per* Story, J., in *Tyler v. Wilkinson*, 4 Mason, 401; *Merritt v. Brinkerhoff*, 17 Johns. 306 [8 Am. Dec. 404]; *Platt v. Johnson*, 15 Id. 217 [8 Am. Dec. 233].

There are some few cases in which the doctrine seems to be sanctioned, that there must be proof of actual damage to entitle the plaintiff, in this and like cases, to a recovery, as in *Williams v. Morland*, 2 Barn. & Cress. 913. But this case was rather questioned in *Mason v. Hill*, 5 Barn. & Adol. 27. But I think the doctrine well settled, that where a party is deprived of such a right, the law will imply some damage; for otherwise before the party might be able to prove actual damage, the wrong-doer might acquire a right by prescription, or upon the presumption of a grant. Thus an injury is likely to ensue from such an invasion of his right, and which is sufficient damage to sustain this action for the recovery of nominal damages at least, and so establish his right. The cases on this principle I will not review, but only refer to *Gardner v. Newburgh*, 2 Johns. Ch. 162 [7 Am. Dec. 526]; *Palms v. Heblethwait*, Skin. 65; *Pastorius v. Fisher*, 1 Rawle.

27; *Ashby v. White*, 2 Ld. Raym. 938, 948, 958; *Well v. Watling*, 2 W. Bl. 1233; *Hobson v. Todd*, 4 T. R. 71; *Pindar v. Vadsworth*, 2 East, 158; *Bolivar Man. Co. v. Neponset Man. Co.*, 16 Pick. 241; *China v. Southwick*, 12 Me. 241; *Crooker v. Bragg*, 10 Wend. 260 [25 Am. Dec. 555]; *Hunt v. Dowman*, Cro. Jac. 478; *Starling v. Turner*, 2 Lev. 50; *Marsetti v. Williams*, 1 Barn. & Adol. 415; *Blanchard v. Baker*, 8 Greenl. 253; S. C., Id. 268 [23 Am. Dec. 504]; *Bower v. Hill*, 1 Bing. N. Cas. 549; *Webb v. Portland Manufacturing Co. U. C. O. for Maine*, 8 Sumn. 189, 1838. This last case is directly upon the question, whether the plaintiff will have a right of action for a diversion of a watercourse, although he has sustained no actual damages; and Justice Story held, after advertising to the authorities against, and for this principle, that an action would lie.

It is the opinion of the court, that an action will lie for the violation of the right, without proof of actual damages, and, therefore, the instructions were erroneous. It is a general rule, that courts will not grant new trials, to enable the plaintiff to recover merely nominal vindictive damages. But although the plaintiff may be entitled to nominal damages only, if the action be brought to try a question of permanent right, as in this case, a new trial may be granted: *Turner v. Lewis*, 1 Chit. 265; S. C., 18 Com. L. 145. The plaintiffs having proved, very clearly, a diversion, the law implies some damage, if it be not justified; the verdict, therefore, is against the evidence. For both reasons, a new trial ought to have been granted.

The judgment is reversed with costs, and the cause remanded with directions to award a *venire de novo*.

Judgment reversed.

RIGHT OF RIPARIAN PROPRIETOR TO USE OF STREAM flowing through his land: See *Wadsworth v. Tillotson*, 39 Am. Dec. 391; *Norton v. Volentine*, Id. 220; *Prescott v. Williams*, Id. 688, and the notes thereto collecting the previous cases in this series on that subject. One riparian proprietor can not so appropriate the use of a stream as materially to injure others jointly interested in it: *Canal Trustees v. Havens*, 11 Ill. 557, citing the principal case.

DAMAGES PRESUMED FROM DIVERSION OF WATERCOURSE: See *Chapman v. Thames Mfg. Co.*, 33 Am. Dec. 401. So, from overflowing of another's land: *Seidensparger v. Spear*, 35 Id. 234, and from every other violation or infringement of another's legal right: *St. Clair County v. Irwin*, 15 Ill. 54; *McConnel v. Kibbe*, 33 Id. 178, citing the principal case.

ROGERS v. DICKEY.

[1 GILMAN, 698.]

EXECUTION DELIVERED TO SHERIFF BEFORE LEVY OF DISTRESS WARRANT for rent, but not levied until afterwards, takes precedence of the distress warrant if the goods have not been actually sold thereunder.

EXECUTION FIRST DELIVERED TO SHERIFF TAKES PRECEDENCE over one subsequently delivered but first levied if the property has not been sold under the latter writ before the first is levied; otherwise if there has been a sale.

EXECUTION AND JUDGMENT LIENS DISBOUNDED at length *per* Young, J.

AGREED case. The opinion states the case.

J. Young Scammon, for the plaintiff in error.

S. T. Logan and A. Lincoln, for the defendant in error.

By Court, YOUNG, J. This was an agreed case in the court below. The record shows that on the eighteenth day of March, 1842, there was due to John Dickey from one Josiah T. Betts, one hundred and fifty dollars, for the rent of a house and lot belonging to Dickey and occupied by Betts; that on the first day of May, 1842, Dickey caused certain personal property of Betts, found on the demised premises, to be distrained for the payment of the rent, by a constable of Sangamon county; and at the July term, 1842, of the Sangamon circuit court, recovered a judgment against Betts for the amount of said rent. On the eighth day of March, 1842, Rogers delivered to the sheriff of Sangamon county a writ of *fiery facias*, duly issued from the Cook circuit court, in favor of the said Rogers, and against the said Josiah T. Betts, for the sum of two hundred dollars, and on the twenty-sixth day of May, 1842, and before the return day of said execution, the sheriff levied upon the personal property then in the hands of the constable by virtue of the said distress, and took the property out of his possession.

The right of the sheriff to take the property from the constable, and to have a prior lien against Dickey to satisfy the execution of Rogers, was submitted by the parties to the court below to be decided, with the privilege of appeal to this court; with an understanding, that if the court should decide that Rogers, or the sheriff, for his benefit, had a right under the *fiery facias* execution, to take the property from the constable, and to have a prior lien against Dickey for the satisfaction of his debt, then the court should order the sheriff to proceed to sell the property for the benefit of Rogers; but otherwise, to redeliver it to the constable for the use of Dickey. The record further

shows, that the property has not been sold either by virtue of the distress or *fieri facias*. The circuit court decided that the sheriff had no right, under the circumstances, to take the property from the constable, and ordered him to redeliver it, in pursuance of the agreement. This decision is assigned for error in this court.

The question is, whether an execution delivered to the sheriff, and in his hands at the time a distress warrant is levied by the constable, takes precedence of the levy by the constable, where there has been no sale of the property levied upon. The adjudged cases upon this subject, to which the court has been referred, are numerous and conflicting, and we are, for the first time, called upon to determine which construction we will adopt as best supported by the weight of authority, and as best calculated to subserve the ends of justice. By the sixth section of the act concerning landlords and tenants, in force June 1, 1827, it is provided, that the person to whom the rent is due, or his agent may, with the sheriff, or some constable of the county, cause the goods of his tenant to be distrained, etc. By the third section of the act to exempt certain articles from execution, in force February 26, 1841, it is further provided, that "in all cases where distress shall be made for rent, before any sale shall be made of the property distrained, it shall be the duty of the party distraining to have the defendant summoned before the circuit court, or justice of the peace if the demand shall not exceed one hundred dollars, and then and there prove his demand as in other cases." Under the provisions of the law, Dickey obtained a judgment in the Sangamon circuit court against Betts for one hundred and fifty dollars.

The sixth section of the "act concerning judgments and executions," in force May 1, 1825, provides, "that all executions shall be made returnable ninety days after date, and no writ of execution shall bind the property of the goods and chattels of any person against whom such writ shall be issued, but from the time that such writ shall be delivered to the sheriff or other officer, to be executed; and for the better manifestation of said time, the sheriff or other officer, shall on the receipt of every such writ, indorse upon the back thereof, the hour, day of the month, and year where he received the same." The eighth section of the Kentucky statute of 1796, concerning executions, provides, "that no writ of *fieri facias*, or other writ of execution, shall bind the property of the goods, etc., against which such writ issued, but from the time such writ shall be delivered

to the sheriff, or other officer, to be executed," etc.: 1 Littell's Kentucky Stat. 540. Here, it will be perceived, that the language of the two acts, so far as the Kentucky act is quoted, is identical. Under this statute, the court of appeals of that state decided in the case of *Tubb v. Harris*, 4 Bibb, 81, 82 [7 Am. Dec. 732], that the lien operates only to preclude the defendant from so disposing of his estate as to prevent it from being taken in execution; but that as between different execution creditors, no lien is created by the delivery of the execution, but only by the first levy: *Arberry v. Noland*, 2 J. J. Marsh. 421, 422; *Kilby v. Haggin*, 3 Id. 211, 212. But if an officer having two executions against the same defendant, should levy the second execution first, he will be liable to the creditor in the execution first delivered, although the levy and sale under the junior execution will be valid: *Kilby v. Haggin*, *supra*. So, where two or more executions in favor of different parties against the same person, shall be delivered to the officer at different times, it is his duty first to satisfy that which first came to his hands; and if he holds an older and junior execution in his hands at the same time, and levies the junior execution first, and by the satisfaction of it, shall so exhaust the property that there shall not be sufficient to satisfy the older execution; and in consequence thereof, the older execution is satisfied out of the estate of the surety of the defendant in the older execution, the officer will be liable on a suit on his official bond, for the injury thereby inflicted on such surety, but the sale on the junior execution will be good. An officer holding the oldest execution is not entitled to take property out of the hands of another officer, who has made the first levy, although made in virtue of a younger execution: *Staton v. Commonwealth*, 2 Dana, 399; *Commonwealth etc. v. Stratton*, 7 J. J. Marsh. 91-93.

The principle settled by the Kentucky decisions in reference to this subject, therefore, are: First, that between execution creditors there is no priority of lien, other than that which is secured by a levy; and second, that when several executions are placed in the hands of different officers, each competent to act, and commanded by the writ to do so, the prior lien attaches in favor of the first levy, though made upon a junior execution, and one which came last to the hands of the officer: *Kilby v. Haggin*, 3 J. J. Marsh. 212, 213; *Million v. Commonwealth*, 1 B. Mon. 311 [36 Am. Dec. 580].

The New York statute declares "that no writ of execution shall bind the property of the goods, but from the time the writ

shall be delivered to the sheriff:" 1 R. L. 502. The construction given to that act by the supreme court of New York is, that after the writ is so delivered, the defendant can not make an assignment, or do any other act to divest the right of the sheriff to take the goods; that the delivery does not alter the property, but it continues in the defendant until the execution is executed, and an execution is said to be executed, when a sale has actually taken place: *Swain v. Morland*, 1 Brod. & B. 370. So, if two writs of *fi. facias* are delivered to the sheriff, and he sells under the junior execution, the sale can not be avoided, and the party injured has no remedy, except against the sheriff. The property of the goods is bound by the sale, and can not be taken by the execution first delivered, and the reason given is, "that sales made by the sheriff ought not to be defeated; for if they were, no man would buy goods levied upon by a writ of execution:" *Marsh v. Lawrence*, 4 Cow. 468; *Smallcomb v. Buckingham*, 1 Ld. Raym. 252; *Payne v. Drewe*, 4 East, 523; *Sandford v. Roosa*, 12 Johns. 163; *Hotchkiss v. McVickar*, Id. 408. So, where a justice's execution was levied on goods which were sold, but previous to the levy a *fi. facias* execution against the same goods had been delivered to the sheriff; held, that the levy and sale upon the justice's execution, changed the property of the goods, and the sheriff could not afterwards take them: *Marsh v. Lawrence*, 4 Cow. 461. But a *fi. facias* delivered to the sheriff takes preference of an attachment levied before the *fi. fa.*, but after the delivery of the *fi. fa.* to the sheriff: *Wells v. Marshall*, 4 Id. 411. It was decided in the case of *Champenois v. White*, 1 Wend. 92, that after a levy under a junior *fi. fa.*, and the officer discovering that the property was subject to an older execution, he may return the *fi. fa. nulla bona*, and such return will be regular. The rule which is laid down in such cases, is, that so long as the property is not actually sold, it continued in the defendant, and the prior lien having attached, will be entitled to the precedence, and will overreach a previous levy by a junior execution, the only question being the priority of the lien, while the general property of the goods remains in the defendant.

The principles settled by the New York decisions are: 1. That after the delivery of the *fi. fa.* the defendant can not, by assignment, or other act, divest the right of the sheriff to take the goods; 2. That the delivery of the *fi. fa.* to the officer does not alter the general property in the goods, but it continues in the defendant until the execution is executed; 3. That the *fi. fa.* first

delivered will have the priority of lien, and take the goods, although first levied upon by a junior *fi. fa.* at any time before the goods are sold: *Wells v. Marshall*, 4 Cow. 411; 4. If the goods be sold on a junior execution before a levy by the older one, the sale is valid: *Marsh v. Lawrence*, 4 Cow. 468; 5. That the liability of the sheriff to whom the first execution is delivered, will depend upon the question whether he is guilty of negligence in not having made a levy before the sale under the second execution; and 6. If two executions are in the hands of the same officer, and he levies and sells upon the one last delivered, the purchaser acquires a good title to the property, yet the proceeds of the sale in the hands of the sheriff will be ordered by the court to be paid to the plaintiff in the first execution to the amount of his debt and costs, leaving the residue, if any, to the plaintiff in the second execution: *Lambert v. Paulding*, 18 Johns. 311; *Marsh v. Lawrence*, 4 Cow. 469.

The English statute of 29 Charles II., c. 3, enacts "that no *fi. fa.*, or other writ of execution shall bind the property of the goods, but from the time such writ shall be delivered to the sheriff, under-sheriff, or coroner, to be executed; and for the manifestation of the time, the sheriff, etc., upon the back of the said writ, shall indorse the day and year when received." Under this statute, which is similar in all respects to our own, if two writs of *fi. fa.* are delivered to the sheriff, he is bound to execute that which is first delivered to him. At common law, before this statute was enacted, the *teste* of the writ, and not the delivery, governed the officer as to precedence. But now, in a case where A. delivered a *fi. fa.* to the sheriff at nine in the morning, and afterwards at ten on the same day, B. delivered another, desiring him forthwith to execute it, which he did, and sold the goods; and afterwards executed A.'s *fi. fa.* on the same goods, it was held, that the first sale of the goods was valid, and that A. had remedy only by action against the sheriff: 6 Bac. Abr. 179; *Smallcomb v. Buckingham*, 1 Salk. 320; S. C., 1 Ld. Raym. 251; S. C., Carth. 419; S. C., 5 Mod. 376; *Hutchinson v. Johnston*, 1 T. R. 729. But where two writs of *fi. fa.* against the same defendant are delivered to a sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure were actually made under the subsequent execution: *Hutchinson v. Johnston*, 1 T. R. 729. So, though a sheriff make a warrant and seizure of goods under a *fi. fa.* last delivered to him, yet

the plaintiff in a *fi. fa.* first delivered to the sheriff, is entitled to be first satisfied out of the fruits of that seizure. This shows that if a sheriff has the writ in his office, though no levy be made on it, if he afterwards get possession of the goods, though apparently on another writ, yet his possession shall inure to the use of the first writ; and that the goods are bound by the writ in the sheriff's hands from the time of its delivery to him: *Jones v. Atherton*, 7 Taunt. 56, 57. But where goods are sold by virtue of a levy made under a junior execution, the sale will be good, and the property can not afterwards be taken on the senior execution. Although an extent at the suit of the crown takes place of an execution, yet, if the goods have been actually sold under the prior execution, the extent will not overreach the sale: *Rybot v. Peckham*, in note to *Hutchinson v. Johnston*, 1 T. R. 730, 731; *Payne v. Drewe*, 4 East, 544.

The doctrine is, therefore, well settled in England, which this court is inclined to adopt: First, that where two or more writs of *fi. fa.* are delivered at different times, either to the same or different officers, and no sale is actually made of the defendant's goods, the execution first delivered must have the priority, though the first seizure may have been made on a subsequent execution; second, but where the goods are actually sold by virtue of a levy made under a junior execution, the sale will be good, and the property can not afterwards be taken from the purchaser by the senior execution. The only remedy of the party injured is against the officer: *Smallcomb v. Buckingham*, 1 Ld. Raym. 251; S. C., 1 Salk. 320; *Payne v. Drewe*, 4 East, 523. The case of *Payne v. Drewe*, referred to by the defendant's counsel, is not different from the principles as here laid down. Lord Ellenborough, after premising that the decision in that case is not contradictory to any of the cases or principles of law before established in the courts of that country, simply determines, "that where there are several authorities equally competent to bind the goods of the party, when executed by the proper officer, that they shall be considered as effectually, and for all purposes, bound by the authority which first actually attaches upon them in point of execution, and under which execution shall have been first executed." This case decides no more than this, that where a levy has been made under a junior execution, and a writ actually executed by a sale of the goods, that the sale will be valid, and the goods can not afterwards be taken by the officer having a senior execution. So, in the case of *Rybot v. Peck-*

ham, Michaelmas term, 19 Geo. III., supposed to be in conflict with the other authorities, it appeared afterwards, by a more minute examination of the case, that there was an actual sale of the property: *Hutchinson v. Johnston*, 1 T. R. 730, 731, note a, citing *Rybot v. Peckham*.

In regard to judgment liens upon land, created by statute, the rule is entirely different. In such cases, the lien commences with the judgment, and continues as long as the statute gives it priority over other liens; and the circumstance of not proceeding upon it, until a subsequent lien has been obtained and carried into execution, has never been considered as divesting the first judgment creditor of his right to have his judgment satisfied out of the same lands, if necessary. In the case of mortgages, a subsequent mortgagee can not, by obtaining a decree for the sale of the mortgaged property, obtain precedence over a prior mortgage, in respect to which all the requisites of the law have been complied with; and a statutory lien is as binding as a mortgage, and possesses the same capacity to hold the land as long as the statute preserves it in force: *Rankin v. Scott*, 4 Pet. Cond. 457. The difference between liens upon lands and personal property is this: that in the case of liens upon lands created by judgment, which is matter of record, the law implies notice to all subsequent incumbrancers and purchasers; while such is not the case in regard to executions against personal property, where the lien attaches from the time of the delivery of the execution to the officer; and the purchaser of the goods is not presumed to suppose that the officer has committed any impropriety in the performance of his duty, and is, therefore, protected in his purchase: *Rankin v. Scott*, *supra*.

Upon the whole, we think the sheriff did no more than his duty in taking the property from the constable, and that the same should be sold for the satisfaction of Rogers' execution. Judgment of the court below reversed, with costs.

Judgment reversed.

PRIORITY AMONG EXECUTIONS DELIVERED AT DIFFERENT TIMES: See *Million v. Commonwealth*, 36 Am. Dec. 580, and the note thereto, collecting the previous cases in this series. See also *Campbell v. Spence*, 39 Id. 301. The doctrine laid down in the principal case on this point is commented on in *In re Tills*, 11 Nat. Bank. Reg. 218, 220, and shown to be different from that which obtains in some of the other states

PRIORITY AMONG JUDGMENT LIENS: See *Andrews v. Doe ex dem. Wilkes*, 38 Am. Dec. 450; *Commercial Bank v. Coroner*, Id. 447; *Campbell v. Spence*, 39 Id. 301, and the cases referred to in the notes to those decisions. The

principal case is cited as an authority on this point in *Kirk v. Vonberg*, 34 Ill. 448; *Scammon v. Swartwout*, 35 Id. 345.

DISTRESS FOR RENT: See the note to *Lichtenthaler v. Thompson*, 15 Am. Dec. 584. See also *Martin v. Black*, 38 Id. 574, and note. In *Morgan v. Campbell*, 22 Wall. 392; S. C., 11 Nat. Bank. Reg. 532, the principal case is referred to as recognizing the doctrine that a landlord has no lien for rent before levy of a distress. That a distress for rent first levied will be postponed to an execution first delivered to the sheriff but subsequently levied, is a principle to which *Rogers v. Dickey* is cited in *In re Jocelyn*, 2 Biss. 240, 242.

CASES
IN THE
SUPREME COURT
OF
INDIANA

BYRKET v. MONOHON.

[7 BLACKFORD, 83.]

WHERE THE SPEAKING OF SLANDEROUS WORDS IS PROVED, the law implies that they were false, and spoken maliciously, and this inference must be overcome by the defendant by countervailing proof.

PERJURY.—THE GENERAL CHARACTER OF PLAINTIFF for truth and integrity may be considered by the jury in an action of slander, where the slanderous words charge perjury, and defendant pleads the truth of the charge, if this defense has been doubtfully sustained.

IDEM.—THE DEFENDANT TO AN ACTION OF SLANDER CAN PROVE THE TRUTH of a charge of perjury only by two witnesses, or by one witness and strong corroborating circumstances. The defendant is held to the same proof that is required of the people on the trial of an indictment for perjury.

PLEA OF JUSTIFICATION TO AN ACTION OF SLANDER can not be considered in aggravation of damages, if the evidence introduced in its support shows that defendant had reason to believe the charge true. What would be the rule if the evidence in support of the plea were offered, not determined.

ACTION of slander. The opinion states the case.

S. W. Parker and O. H. Test, for the appellant.

O. B. Smith and J. S. Newman, contra.

By Court, BLACKFORD, J. Monohon brought an action of slander against Byrket, for charging him with perjury. Plea, that the charge was true. Replication, *de injuria*. Verdict and judgment for the plaintiff.

On the trial, the court, on the plaintiff's motion, instructed the jury as follows: 1. If the statement was false, and was de-

liberately made, with a full knowledge of its falsity, you may infer the corrupt intention. Whether the statement was thus made, or whether it was the result of mistake, ignorance, or inadvertence, are questions for your determination, looking at all the facts of the case. 2. If the defense be doubtfully sustained, you may take into consideration the plaintiff's general character as a man of truth and integrity. But if, on the contrary, you should be satisfied from the evidence that he committed perjury on the trial, his character, however good, would be wholly immaterial. 3. Two witnesses, or one witness and strong corroborating circumstances, are necessary to sustain the truth of the plea. But the necessity of more than one witness is confined to the proof of the falsity of the plaintiff's statement. As to all the other material allegations in the plea, except the falsity of the statement, one witness is sufficient. 4. To sustain the issue on the defendant's part, he must have proved the plea of justification to be true by two witnesses, or by one witness and strong corroborating circumstances; and if he failed to do so, the jury must find for the plaintiff. 5. The only issue in this cause is, whether the plaintiff is guilty of perjury or not? and if the defendant has failed to prove that his plea is true, and that the plaintiff was guilty of perjury, it is a great aggravation of the slander to have the truth of the charge alleged and placed on the record by the plea; and the jury should take it into consideration in assessing the damages against the defendant. To all these charges the defendant excepted.

The defendant has no reason to object to the first instruction. When the plaintiff, in an action of slander, proves the speaking of the actionable words laid, the law implies that they are false, and that they were spoken maliciously, unless there is evidence sufficient to satisfy the jury to the contrary; *Yeates et Ux. v. Reed et Ux.*, 4 Blackf. 463 [32 Am. Dec. 43]; *Roberts v. Camden*, 9 East, 93. The second instruction is unobjectionable. The defendant undertook to prove that the plaintiff had committed perjury; and the jury, in making up their minds on the subject, had surely a right to take into consideration, if the defense was not clearly proved, the general good character of the plaintiff for truth. Indeed, it would seem that such evidence ought never to be withdrawn from the jury, though it will often be rendered of no avail by the nature of the defendant's evidence. If the plaintiff were indicted for the offense, it would be proper for the jury, in making up their verdict, to take into consideration his general good character for truth: Roscoe's

Crim. Ev. 72; and the law must be the same in the case before us. The third and fourth instructions are correct. There could be no objection to them, had the trial been on an indictment against the plaintiff for perjury: *Id.* 686; *Regina v. Yates*, 1 Car. & M. 132; and the law on the subject must be the same in this case. See *Woodbeck v. Keller*, 6 Cow. 118; *Offutt v. Earlywine*, 4 Blackf. 460 [32 Am. Dec. 40]; *Chalmers v. Shackell*, 6 Car. & P. 475.

The fifth instruction is erroneous. The plea of justification was not, so far as appears by the record, any ground for increasing the damages. What would be the effect of the plea, if no evidence tending to sustain it was given, we shall not now determine. It is sufficient for the decision of this case to say, that it does not necessarily follow, as this instruction supposes, that the justification, if not fully proved, should aggravate the damages. The plea may not have been entirely proved, and yet if the evidence introduced under it showed that the defendant had reason to believe, from the plaintiff's conduct, that the charge was true, the damages could not be increased in consequence of the plea, as the evidence given under it would then go in mitigation of damages: *Chalmers v. Shackell*, *supra*. See also *Sanders v. Johnson*, 6 Blackf. 50 [36 Am. Dec. 564].

The judgment is reversed with costs. Cause remanded, etc.

THE DEFENDANT IN AN ACTION OF SLANDER under a plea in justification is held to the same proof of the charge that the people would be were the plaintiff on trial under an indictment charging the offense of which he is accused by the slanderous words: *Landis v. Shanklin*, 1 Ind. 93; *Wilson v. Barnett*, 45 Id. 168.

A FAILURE TO SUSTAIN A PLEA IN JUSTIFICATION IN SLANDER need not necessarily be considered in aggravation of damages, and a charge to the jury that they should so consider it will be cause of reversal: *Shank v. Case*, 1 Ind. 170. Indeed if the evidence is not sufficient to sustain the plea, yet if it is enough to show that defendant had reason to believe the charge true, this should be considered in mitigation of damages: *Shoulty v. Miller*, *Id.* 548. See, however, *Gilman v. Lowell*, 24 Am. Dec. 96, which holds that an unsuccessful attempt to justify enhances the damages.

PRESIDENT, TRUSTEES, ETC., OF CONNERSVILLE v. WADLEIGH.

[7 BLACKFORD, 102.]

IN ACTION FOR THE PRICE OF GOODS SOLD WITH WARRANTY, FRAUD may be set up, under the general issue, though the fraud consisted in representations as to the quality of the goods, which were not covered by the warranty.

WILLFUL MISREPRESENTATION OF QUALITY IS NOT SUFFICIENT to avoid a sale of personal property, unless the defendant was deceived by it, and unless it formed an inducement to him to make the purchase.

EXPRESS WARRANTY WILL NOT REACH OPEN VISIBLE DEFECTS OR QUALITIES of goods sold, whose existence is clear to the buyer, though they are inconsistent with its terms. Thus though a fire-engine is warranted to be equally efficacious with others larger and more costly, whereas its inferiority is patent to every ordinary observer, there is no breach of warranty.

ASSUMPSIT. The opinion states the case.

J. S. Newman, for the plaintiffs.

S. W. Parker and C. H. Test, *contra*.

By Court, *DEWEY, J.* *Assumpsit* by Wadleigh against the president and trustees of Connersville. Two counts are upon promissory notes, expressed upon their face to be given by the defendants to the plaintiff for the price of a fire-engine. There are also counts for a fire-engine sold and delivered. Pleas, 1. General issue. 2. That the engine named in the several counts was warranted by the plaintiff to work and perform well, etc.: that it did not work well, etc., but was wholly useless and of no value; wherefore the consideration of the several promises had wholly failed, etc. 3. Same as the second, except that the averment of no value is omitted; and an allegation of notice to the plaintiff of the insufficiency of the engine and of a request to take it away is added. 4. A plea very properly declared bad on general demurrer. 5. Same as the third, except that the warranty is more particularly set forth, and is shown to be in writing. To the second, third, and fifth pleas, the plaintiff replied that the engine did work and perform well, etc. Issue upon the replication; verdict and judgment for the plaintiff. The defendants prayed the court to instruct the jury, that, if the plaintiff knowingly and falsely represented to the defendants the engine in question to be "as good as a larger one then in use at Oxford, Ohio," such false representation was a fraud upon them, of which they had a right to avail themselves in their defense. The court refused. There was evidence tending to show that the plaintiff had made the misrepresentation implied by the charge asked for.

It was competent for the defendants to set up, under the general issue, fraud in the sale of the engine, although there might have been an express warranty by the seller which was not violated by the fraudulent matter: *Steward v. Coesvelt*, 1 Car. & P. 23. But we do not think the court erred in refusing to instruct

the jury as requested. Whether the willful and false representation made by the plaintiff amounted to fraud, in contemplation of law, depended upon the circumstances under which it was made. Of these circumstances we know nothing, not even that the statement was made at the time of the sale; but supposing it was, there is nothing in the record to show that it had any influence on the defendants in making the contract. For aught that appears they might have been aware of its falsity; if so, it was not fraud in law; they were not deceived by it. Or the defendants might have been entirely ignorant of the capacity and qualities of the engine at Oxford; if such was the fact, a general statement that the machine they were about to purchase was as good as that engine, can hardly be supposed to have misled their judgment in respect to the power and quality of the subject of the contract. We certainly can not pronounce the circuit court wrong in refusing to instruct the jury that the misrepresentation, though willfully made, was in itself, and without reference to the other facts of the case, a fraud on the defendants.

One of the terms of the express warranty set out in the pleas, and proved on the trial, was, that the engine, sold by the plaintiff to the defendants, would "answer the purposes of a fire-engine in all its uses, as well and effectually as any other engine in use in the western country." It appeared from the evidence that there were, in the western country, much larger and more costly engines, which were more effectual in extinguishing fire than the warranted machine. And the court permitted the plaintiff to prove, that the inferiority of the latter engine (the cost of which was four hundred dollars) to those larger ones was plain and palpable to an ordinary observer, and instructed the jury, that if they found such inferiority was plain to common observation, and that the engine worked as well and effectually as any other engine of the same size, its inferiority to larger machines was no breach of the warranty. The defendants objected to the evidence and instruction.

The general principle is, that open, visible defects or qualities of goods sold and warranted are not reached by the warranty, though they are inconsistent with its terms; for the seller is not supposed to warrant against defects and qualities, whose existence is clear to the buyer and everybody else: 3 Bl. Com. 165; *Dyer v. Hargrave*, 10 Ves. 507. On this principle, we think the decision of the circuit court can be sustained. The authorities referred to show that the want of an ear to a horse, or a roof to a house, is not a violation of a warranty that they were respectively

perfect. We can easily conceive that the inferiority of a small and cheap fire-engine to a large and costly one, is as palpable to a man of common sense as the absence of an ear to a horse or a roof to a house; and it is past belief that the plaintiff designed to warrant that such inferiority did not exist. The circuit court put the question of a breach of the warranty on the ground that if in point of fact it was plain and evident to a common observer that the engine in question was not equal in efficacy to certain larger engines, the inequality was no violation of the warranty; and, in our opinion, they put it on the true ground.

The defendants moved the court to suppress two of the plaintiff's depositions. The facts were these: The defendants notified the plaintiff that they would take depositions before a certain justice, and at a time and place specified, in Ohio; and the plaintiff gave the defendants notice that he would take depositions before the same justice and at the same time and place. The plaintiff took out no *dedimus*. The parties attended according to the mutual notices, and both took depositions without objection; the defendant's depositions were read on the trial. The court overruled the motion, and refused to suppress the plaintiff's depositions. The objections to the depositions were, want of sufficient notice, and of a *dedimus* on the part of the plaintiff. The first objection is clearly groundless, because both parties attended at the taking of the depositions; and we think that, under the circumstances, the second should not prevail; a *dedimus* on the part of the plaintiff was waived by the acts of the parties.

The judgment is affirmed with costs.

See, *contra*, *Stucky v. Clyburn*, 34 Am. Dec. 590, which holds that an express warranty covers even open, notorious defects that were known to the purchaser.

DOE v. BROWN

[7 BLACKFORD, 142.]

ONE WHO ENTERS UPON LAND UNDER A CONTRACT OF SALE IS BUT A TENANT AT WILL, until the execution of the conveyance, and though he may have paid the purchase money, his tenancy may be determined by a demand for the possession, and if this be refused, the possession may be recovered in an action of ejectment.

EJECTMENT. The opinion states the case.

O. H. and C. B. Smith, for the plaintiff.

S. W. Parker. contra.

By Court, BLACKFORD, J. This was an action of ejectment on the demise of Margaret Brumfield against William Brown, for a tract of land in Fayette county. Plea, not guilty. The cause was submitted to the court, and judgment rendered for the defendant. The facts are as follows: The lessor of the plaintiff, being the owner of the land, contracted with the defendant and one Bolton to sell them the same for three thousand dollars, payable by installments. A title bond was accordingly executed by the vendor to the vendees, conditioned for a conveyance of the land on payment of the purchase money; and the latter gave their notes to the former for the purchase money, payable agreeably to the contract of sale. The notes were afterwards assigned, and a judgment on some of them was obtained by the assignee. Only five hundred dollars of the purchase money have been paid; the legal title to the land remains in the vendor; and Brown is in possession. Before the commencement of the suit, the lessor of the plaintiff demanded possession of Brown, and the same was refused. The defendant proved by parol that shortly after the agreement, Mrs. Brumfield removed from the premises, and that he, the defendant, took possession of the same, and has occupied them ever since. This parol evidence was objected to, but the objection was overruled.

The facts proved by parol, supposing the evidence admissible, do not affect the case. We consider the law on the subject to be, that where a person enters into possession of real estate under a contract of sale, the vendor may, at any time previously to executing the conveyance, demand possession of the premises, and may also, if the demand be not complied with, recover the possession in an action of ejectment. The following case supports that doctrine: Ejectment. The lessors of the plaintiff having proved their title, the defendant stated, that one of the lessors had agreed to sell the land to one Blackwell, who had paid five hundred and twenty-four pounds, which was part of the purchase money, on which he was let into possession; he being willing to pay one hundred and thirteen pounds more, which was the residue of the purchase money, on a proper conveyance being executed. The court said that if there had been any demand of possession, or anything to determine the estate at will which Mr. Blackwell had, the plaintiff was entitled to recover at law. The plaintiff then proved a demand of possession, and the jury, by direction of the court, rendered a verdict for the plaintiff: *Doe d. Hiatt et al. v. Miller*, 5 Car. & P. 595. The demand

is in such cases necessary in order to place the vendee, whose entry was legal, in the situation of a wrong-doer: *Right d. Lewis et al. v. Beard*, 13 East, 210; *Taylor v. McCrackin*, 2 Blackf. 260; *Stackhouse et al. v. Doe d. Reynolds et al.*, 5 Id. 570.

The defendant contends that he was, at all events, entitled to three months' notice to quit by virtue of the statute concerning tenants holding over: R. S. 1838, p. 584. The statute, however, only applies to cases where the relation of landlord and tenant exists between the parties, a rent being reserved; but here there was no tenancy in which rent was payable, and the case, therefore, is not within the statute. The defendant was to be sure in possession of the premises with the consent of the lessor of the plaintiff, but that was all; and the right to such possession was determined at law by the demand of the possession made before the commencement of the suit.

The judgment is reversed with costs. Cause remanded, etc.

THE VENDEE UNDER AN EXECUTORY CONTRACT OF SALE is not entitled to the possession, at any time before the contract is executed by the delivery of a conveyance, and until that time may be dispossessed by his vendor, if he refuse to surrender the possession on demand: *Wright v. Blackley*, 3 Ind. 103; *Kratemayer v. Bunk*, 17 Id. 511, citing the principal case.

See in accordance with this, *Holmes v. Schofield*, 29 Am. Dec. 364; but the vendee is entitled to notice to quit and demand of possession before he may be sued in ejectment: *Harle v. McCoy*, 23 Id. 408.

GOBLE v. GALE.

[7 BLACKFORD, 218.]

DORMANT PARTNER NEED NOT BE JOINED by the ostensible partner in an action upon a contract entered into by him in his own name.

MECHANIC'S LIEN IS NOT WAIVED by taking the notes of the debtor, nor by giving to the latter a receipt as in full for the demand.

BILL in equity. The opinion states the case.

J. Morrison, for the plaintiff.

S. C. Stevens, contra.

By Court, DEWEY, J. This was a bill in equity to enforce a mechanic's lien against certain real property. It appears by the pleadings, exhibits, and depositions, that the complainant, Goble, contracted with Gale, one of the defendants, to build for him a dwelling-house on certain premises. The work was completed on the twenty-fourth of June, 1841, and Gale then executed to Goble several promissory notes for the money due on the build-

ing contract, and Goble gave Gale a receipt in full for it. One of the notes, and the only one unpaid when the bill was filed, was for ninety-seven dollars and fifty cents, payable nine months after date. On the day of the maturity of this note, that is, on the twenty-fourth of February, 1842, Goble filed in the office of the recorder of deeds, notice of his intention to hold a lien on the dwelling-house erected by him, and on the ground on which it stood. On the seventh of September, 1841, Gale, being indebted to Twining, the other defendant, in the sum of one thousand seven hundred dollars, mortgaged the premises to him to secure that sum, Twining having no knowledge of the lien claimed by Goble. The mortgage was filed for record February 2, 1842. Goble, at the time of making the contract to build the house, and at the time of filing the bill, had a dormant partner, one Dutton; but the contract was made by Goble in his own name exclusively, and Gale knew nothing of the partnership. The bill was filed in May, 1842. The circuit court, on the final hearing of the cause, dismissed the bill for want of equity, and decreed costs against the complainant.

The statute on which the bill is founded gives mechanics a lien on buildings constructed or repaired by them; requires any one wishing to avail himself of its provisions, "to file in the office of the recorder of the proper county, within sixty days after the debt becomes due, notice of his intention to hold a lien on the property for the amount claimed to be due," etc.; and provides that the bill to enforce the lien shall be filed within one year from the time of completing the work: R. S. 1838, pp. 412, 413. It is contended that the bill can not be sustained for the want of proper parties, the omission to join Dutton, the dormant partner of Goble, as a complainant, being fatal. This objection can not be sustained. In common law suits it is settled, that a person contracting exclusively in his own name, though he have a dormant partner interested in the contract, need not join such partner in a suit on the contract: 1 Chit. Pl. 13; Coll. on Part. 393. And we conceive the law to be the same in equity: Story's Eq. Pl. 157, note; *Hawley v. Cramer*, 4 Cow. 717. It is also contended that Goble waived his lien by taking Gale's notes, and giving him a receipt in full for the money due for building the house. We think otherwise. A vendor's lien is not extinguished by taking the purchaser's obligation for the purchase money. 2 Sug. 57, 58; *Boon v. Murphy*, 6 Blackf. 272. Nor does the vendor's receipt for the purchase money, indorsed on the conveyance, affect the

lien, provided the land conveyed be not actually paid for: *Coppin v. Coppin*, 2 P. Wms. 291. The taking the notes and giving the receipt in the present case can have no greater effect. They are not, in contemplation of law, evidence that Goble waived his lien; and in the absence of evidence of such intention the lien holds good.

Another objection has been urged to the sufficiency of the bill. It is alleged that Goble forfeited his lien by not giving timely notice, under the statute, of his intention of enforcing it. This objection is founded upon the supposition that the sixty days, within which the act requires the notice to be given in the recorder's office, must date from the time of the completion of the mechanic's work, and not from the time when the money due him shall be payable after the expiration of a credit given. This is not an open question. We decided in the case of *Robinson et al. v. Marney et al.*, 5 Blackf. 329, that, when a credit is given, the money for materials furnished is not due, in the contemplation of the statute, until the expiration of the credit; and that giving the notice within sixty days from that time is sufficient. Goble filed notice of his intention to rely upon his lien on the day Gale's note for a part of the money due on the building contract became payable, and of course preserved his lien. Twining, consequently, took his mortgage of the premises in question subject to Goble's incumbrance. We think the circuit court erred in dismissing the bill. There should have been a decree in favor of the complainant.

The decree is reversed, with costs. And this court, finding the sum of one hundred and eleven dollars and thirty-seven cents to be due from Gale to Goble, for which the latter holds a lien on the premises mentioned in the bill, will, unless Gale or Twining pay said sum with interest, and the costs of this suit in the court below and in this court, to the clerk of this court, on or before the first day of the next term thereof, decree that the premises be sold to satisfy said sum, interest, and costs.

WAIVER OF MECHANIC'S LIEN.—The waiver of such a lien must either arise from the consent of the mechanic, express or implied, or else from such a line of conduct as has estopped him from asserting it. Naturally the most vexed questions arise in discussing as to when an implied consent exists. It seems, however, well settled that taking evidence of the indebtedness can not alone operate such a waiver. Thus the acceptance of the debtor's promissory note is not alone sufficient to effect a waiver of the lien, in the absence of any express agreement that it shall so operate: *Scott v. Ward*, 4 G. Greene, 112; *Logan v. Atter*, 7 Iowa, 77; *Brady v. Anderson*, 24 Ill. 110; *Mix v. Ely*, 2 G. Greene, 513; *Greene v. Ely*, Id. 508; *Milwain v. Sanford*, 3

Minn. 147; *Gere v. Cushing*, 5 Bush, 304; *Edwards v. Derrickson*, 28 N. J. 39; *Doane v. Clinton*, 2 Utah, 417. Though the note is payable after the expiration of the time limited by law in which the lien must be filed, yet the lien is not waived if it be payable before the time in which an action must be brought for its enforcement; for the mechanic is allowed to file the lien before his note has fallen due: *Müller v. Moore*, 1 E. D. Smith, 739; *Ashdown v. Woods*, 31 Mo. 465; *McMurray v. Taylor*, 30 Id. 264. It may as well be said here that if the note given was negotiable, it must on the trial be produced and surrendered, in order that the maker may be protected against any possibility of payment to an innocent indorsee.

The question has arisen as to what consequence will follow if a note given to represent a debt, secured by mechanic's lien, has been negotiated. In Iowa it has been held that the negotiation of the note absolutely destroys the lien: *Scott v. Ward*, 4 G. Greene, 112; though a mere attempt at negotiation will not cause any such consequence: *Hawley v. Ward*, Id. 36. The correct view, however, seems to be that the lien will revive in favor of the payee, if by reason of the default of the maker, he becomes liable upon his indorsement, and takes up the note. The leading case in support of this view is *Graham v. Holt*, 4 B. Mon. 61; and from the opinion delivered in that case, we quote: "In giving the lien the statute did not intend to destroy the personal obligation of the debtor, nor to prevent its being evidenced in the form of a note. The security which will prevent or destroy the lien is something in addition to this personal obligation, and in aid of it, and which, so far as it is realized for the benefit of any holder of the debt, will discharge the debtor's obligation to pay it. Construing the statute literally, this security, in order to effect the lien, must be taken by the person to whom the lien is given. And if no such security be taken by the mechanic or material-man, the lien attaches and stands enforceable by bill filed by him within the year, making a clear and distinct statement of the claim, etc. Up to the filing of the bill, the statute places no other restriction or condition upon the existence or enforceability of the lien. What, then, is to be the effect of the assignment of the note for value received by the payee under his responsibility as assignor, and his regaining the note by refunding the consideration received for it, either before or after it becomes due, but while it is still unpaid by the maker? Surely it would be a perversion of the statute and of the transaction itself, to say that this responsibility of the assignor is such security as destroys the lien, or that his payment to his assignee in obedience to that responsibility should have that effect. The lien is given to secure the debt from the employer or owner to the mechanic or material-man. If any other security be taken for that debt, there is no lien. Now, suppose it were conceded that the assignee, immediate or remote, of the mechanic or material-man, being the proprietor of the debt from the employer or builder, may destroy the lien irrevocably by taking security for that debt, the assignment itself, by which alone he becomes proprietor of the debt, can not be a security for the debt taken, by the proprietor, for he is not proprietor until the assignment is made. The responsibility of the assignor does indeed afford to the assignee a security for his reimbursement, in addition to that which the obligation of the maker affords, but it is a security that does not come in aid of the obligor himself nor of his indebtedness. A payment by the assignor to the assignee is not a payment of the obligor's debt for which the lien is given. It does not operate to discharge his obligation to pay that debt, and create a new obligation to indemnify or reimburse the assignor, as in case of ordinary securities, but leaves the original obligation unperformed, and still enforceable, without any other security for its performance, or any

other mode of enforcing it than if it had never been assigned." See also, in support of this view, *Sweet v. James*, 2 R. I. 270. It has, however, been held that the assignment of a claim secured by this lien, operates its destruction, and that a re-assignment does not revive it: *Caldwell v. Lawrence*, 10 Wis. 331; *Teuksbury v. Bronson*, 48 Id. 585. If a note which has been taken from a debtor include, not only the debt secured by lien, but also other debts, the lien is waived: *Schulenburg v. Robinson*, 5 Mo. (App.) 561.

The mechanic's lien has sometimes in the decisions of the courts been assimilated to a vendor's lien, and these decisions have, accordingly, treated the lien as waived where additional security has been taken by the lienor. Thus, if the mechanic accepts a lien upon the property upon which he has erected a building, he waives his lien. "It is a rule that where a vendor takes a mortgage on the property sold he waives his vendor's lien, and it has been so held by this court: *Pease v. Kelly*, 3 Or. 417; *Nairn v. Prowse*, 6 Ves. 752; *Lagow v. Badollet*, 1 Blackf. 416; S. C., 12 Am. Dec. 258; *Gilmore v. Brown*, 1 Mason, 191; *Williams v. Roberts*, 5 Ohio, 35; 4 Kent's Com. 154; Hough on Liens, sec. 202. And there seems to be no difference in principle between vendors' liens and the liens of mechanics, and it has been so held in many cases: *Kinzey v. Thomas*, 28 Ill. 505; *Gardner v. Hall*, 29 Id. 277; *Gorman v. Sagner*, 22 Mo. 137; *Barrows v. Baughman*, 9 Mich. 213. From these numerous authorities the rule seems to be well settled that where a mechanic takes a mortgage, either on the same property to which the lien attaches or on other property, he thereby waives his lien, and the reason is, as is observed in many of the cases cited, that the subsequent lien-holders and purchasers have a right to rely on the record, and should be protected against secret liens. In this case it is true that the lien was filed at the same time that the mortgage was given, but if the general doctrine be established that the taking of a mortgage on the property is not a waiver of the mechanic's lien, a mechanic may hold a mortgage on the property, and afterwards, at any time allowed by the statute, file his lien:" *Trullinger v. Koford*, 7 Or. 228; *Gorman v. Sagner*, 22 Mo. 137. So accepting a chattel mortgage from the debtor is a waiver of the lien: *Kinzey v. Thomas*, 28 Ill. 505. And if the agreement itself provide that the contract price shall be secured by mortgage on the premises, there can be no mechanic's lien: *Barrows v. Baughman*, 9 Mich. 213; *Weaver v. Demuth*, 40 N. J. 238; at least where no attempt is shown to obtain the security provided for by the contract. So, also, where one of the members of a firm owns a lot, and he purchases timber to improve the same, and the firm note is given in payment, that is additional security that destroys the lien: *Oroskey v. Corey*, 43 Ill. 442.

These cases hardly comport, we think, with certain decisions made in Pennsylvania. The first case we refer to is that of *John Thompson*, 2 P. A. Brown, 299. There lienors had accepted bonds and warrants of attorney for the amount of their claims, which they had then caused to be entered up. It was contended on the part of certain mortgagees, whose claims accrued subsequent to the inception of these liens, but prior to the acceptance of the bonds by the lienors, that these latter had, by this act, waived their liens and were postponed to the mortgagees. And it certainly does seem that the lienors must be considered as having taken additional security. But the court meets the objection thus: "It is a general rule that the acceptance of a higher security than the creditor had before, is an extinguishment of the first debt; as if a creditor by simple contract accepts an obligation, this is an extinguishment of the simple contract debt; but the acceptance of a security of an inferior nature or of a security of equal degree does not extinguish the first debt; as in the one case if a bond is given in satisfaction of a judgment; and in the other where the

obligee has a second bond given him for the first debt. * * * In the case before us the debts of the mechanics or lumber merchants were originally simple contract debts; but for the security of these debts, the act has created a lien on the building, so that the security which the creditors had in relation to the safety of the debts, ranked with that of a judgment or mortgage. For two years the lien is to continue without any act to be done by the creditors." The court then comes to the conclusion that the lien being of equal dignity with a judgment is not defeated by a confession of judgment, accepted by the mechanic. In further support of this, see *Orean v. Moore*, 2 Miles, 214. If this view is correct, it seems to us that the cases which hold that a mortgage upon the property upon which the lien exists is such additional security as avoids the lien must be wrong, for surely then the mortgage must be an inferior security to the lien.

The views, however, of the Pennsylvania courts have been lately adopted in California: *Germania Building and Loan Association v. Wagner*, 10 P. C. L. J. 79. In that case the court held that the institution of suit upon the claim and its prosecution to judgment did not waive the lien.

ALDRIDGE v. DUNN.

[7 BLACKFORD, 249.]

VENDOR'S LIEN IS NOT WAIVED by taking the purchaser's note for the amount due.

IDEM—NO WAIVER OF A VENDOR'S LIEN ARISES FROM AN EXTENSION OF CREDIT to the purchaser.

VENDOR MAY HAVE RECOURSE IN EQUITY TO HIS LIEN after he has unsuccessfully attempted to collect the debt at law.

VENDOR'S LIEN MAY BE ASSERTED AGAINST JUDGMENT CREDITORS of the purchaser, but not against *bona fide* purchasers from the latter without notice.

BILL in chancery. The opinion states the case.

J. Pitcher, for the appellant.

G. S. Green, contra.

By Court, BLACKFORD, J. This was a bill in chancery filed in July, 1842, by the appellant, to enforce an equitable lien on real estate in Posey county, for unpaid purchase money. The material facts are as follows:

In January, 1841, the complainant sold and conveyed to Dunn, one of the defendants, a certain tract of land for five hundred and fifty dollars, received at the time four hundred dollars of the purchase money, and took the purchaser's promissory note for the remaining one hundred and fifty dollars, payable in July following. Something was said at the time of the sale about the buyer's giving a mortgage, but a person present observed that the buyer was as good as any one for the balance due, and

the complainant seemed to coincide in that opinion. The four hundred dollars thus paid, were borrowed by Dunn of one Rogers, agent of Lougee and Moore, to secure which Dunn promised to give a mortgage on said land, but none was ever given. When said note fell due, the complainant proposed to the maker that if he would pay him fifty dollars, he would give until the first of March following for the payment of the balance. Dunn accordingly paid the fifty dollars, took up the old note, and gave the complainant a new one for the balance, payable the first of March following.

The fifty dollars so paid were also borrowed of Rogers, agent as aforesaid. When the last note was given, the complainant asked Rogers if he had, or observed that he had, a mortgage on said land; Rogers replied that he had not, but that he had the promise of one. Dunn, at that time, had sufficient property, besides said land, to pay the debt; and Rogers then knew that the last-named note was for the balance of said purchase money. In October, 1841, the complainant took out a writ of *ne exeat* against Dunn on the last-named note, in which case special bail was taken, but in April following, the principal being surrendered by the bail, was discharged under the act abolishing imprisonment for debt. In November, 1841, Dunn confessed, before a justice of the peace, judgments in favor of Lougee and Moore for the amount lent to him as aforesaid, and judgments also in favor of Hinch and Leonard, transcripts of which were filed in the clerk's office of the circuit court of said county. In March, 1842, the complainant sued Dunn on the note for one hundred dollars, obtained judgment, and took out execution thereon, which was returned *nulla bona*. There are some other matters stated in the answers, but they are not of such a character as to be evidence in the cause. The court decreed that the judgments of Hinch and Leonard be enjoined, and that the bill be dismissed as to the other defendants.

The complainant, in consequence of the sale, had an equitable lien for the part of the purchase money which was not paid, the taking of the note for the amount not affecting the case: Sug. Vend. 61; and there is not sufficient evidence to show that the lien has been abandoned. That the complainant considered the purchaser able to pay; that when the first note fell due, the time for payment of part of the amount was extended; that the purchaser then had sufficient property, besides said land, to pay the debt; and that the complainant endeavored, without effect, to collect the debt by a suit at law, can not, we think, make any

difference as to the complainant's claim. Nor do the judgments confessed affect the equitable lien in question. A purchaser for valuable consideration, without notice, is not bound by such lien; but the law is otherwise as to judgment creditors: Story's Eq. 480. We think, therefore, that the bill ought not to have been dismissed.

There is, also, an error in the proceedings previous to the decree. The complainant, in the course of the cause, suggested the death of Lougee, one of the defendants, and the suit, on the complainant's motion, was revived against the heirs of the deceased. If Lougee had filed an answer before his death, the suit might, by virtue of the statute, have been revived on the complainant's motion: R. S. 1838, p. 442; but there was no such answer, and a bill of revivor was therefore necessary.

The decree dismissing the bill as to some of the defendants is reversed, and the proceedings against the heirs of Lougee set aside. Cause remanded, etc.

ORDERED to the point that the lien of a vendor is paramount to the claims of the judgment creditors of his vendee, in *Peel v. Beers*, 4 Ind. 47; and in *Mendenhall v. Treadway*, 44 Id. 134, to the point that the grantee in a deed executed without consideration is affected by the same equities as his grantor.

BUNTS v. COLE.

[7 BLACKFORD, 263.]

PURCHASER AT AN EXECUTION SALE WHO HAS DISCOURAGED COMPECTION thereat by his representations, will have his purchase set aside at the instance of the execution debtor or of his creditors.

PURCHASER AT AN EXECUTION SALE whose purchase is set aside is entitled to be reimbursed the amount that he has paid, and has a lien upon the land for such amount.

BILL in equity. The opinion states the case.

J. B. Howe, for the plaintiff.

W. H. Coombs, contra.

By Court, SULLIVAN, J. The bill in this case was filed by Bunts, the plaintiff in error, to set aside, as fraudulent, a sale of a tract of land made by the sheriff of La Grange county. The bill states that, by virtue of a judgment and execution in favor of one McIlvaine for the sum of about fifty dollars, a tract of land belonging to the complainant, of the value of seven hundred dollars, was sold by the sheriff of the county of La Grange, and purchased by Francis F. Jewitt, at and for a

sum barely sufficient to satisfy the judgment; that fraudulent means were resorted to by Jewitt to purchase the land at a price greatly below its real value; that while the sale was progressing, he represented to persons who were bidding for the land, that the complainant had deserted his wife and children, leaving them in a destitute condition, and that he, as the agent of Allen B. Cole, a son of the complainant's wife by a former husband, wished to purchase the land for the benefit of complainant's family; that by means of his representations, etc., persons were induced to refrain from bidding, etc. The bill further states, that Jewitt acted as the agent of Cole in making said purchase, and that the purchase money was furnished by Cole. Jewitt and Cole are made defendants to the bill.

Cole, in his answer, admits the sale of the land by the sheriff, and the purchase of it by Jewitt as his agent. He says that a short time before the land was sold, being then a resident of Hamilton county, he visited his mother, the wife of the complainant, in La Grange county; that he found her residing on said land, abandoned by her husband, and supporting herself by her own labor; that he thereupon determined to purchase the land, intending it for the use of his mother and her children so long as they wished to live on it; that he employed his co-defendant Jewitt, to purchase the land for him, and furnished him with fifty-four dollars and fifty cents with which to make the purchase. He admits that the sheriff conveyed the land to Jewitt, and that Jewitt has since conveyed it to him.

The answer of Jewitt admits the purchase of the land at the sheriff's sale by the respondent, as the agent of Cole, for the sum of fifty-four dollars. It denies that the respondent made any false representations to prevent others from bidding for the land, but admits that he did, at and pending the sale, make it known to some persons that he was bidding for the land, not for himself but for his co-defendant Cole, whose object was to purchase it as a home for his mother. The respondent admits that, while the sale was progressing, a stranger who was present offered a bid for the land, or talked about doing it, but when he was informed that respondent was acting as the agent of Cole, he declined bidding. He admits that he received a deed for the land from the sheriff, and says he has conveyed to Cole. No replications to the answers were filed; depositions were taken; and at the final hearing on bill, answers, and depositions, the court dismissed the bill.

Frederick Hamilton swore, that he was the sheriff of La Grange

county at the time the land was sold, and that the sale was conducted by himself in person; that there were several persons at the sale, but that no one bid except Jewitt and another man who was a stranger to the witness; that when the stranger bid for the land, Jewitt took him aside, they shortly returned, and the stranger then withdrew his bid and would not bid again; that before he was taken away by Jewitt, he appeared to be anxious to bid; that witness described the land to him, and told him the title was good. The witness further says, that Jewitt told him that he was purchasing the land for the benefit of the wife and children of Bunts, on hearing which he, the witness, did not care how cheap the land sold, and so told the stranger. Jonathan Woodruff swears, that he did not attend the sale and bid, because he was assured by Jewitt, that Mrs. Bunts would pay him a debt that her husband owed him; that he considered Jewitt to be responsible for the debt, and had it not been for what Jewitt and Mrs. Bunts said, and the arrangement made by them, he should have attended the sale and bid more than Jewitt did. He understood the object they had in view to be, that Mrs. Bunts might get the land as cheap as possible. He further states that neither Jewitt nor Mrs. B. paid him, but that Bunts himself paid the debt. James H. Holmes testifies, that he did not attend the sale and bid for the land as he intended, because he was assured by Jewitt, that a debt that Bunts owed him should be paid; and, also, because he was told by Jewitt that the land was to be purchased for the use of Mrs. Bunts and her children. Three witnesses swore that the land with the improvements was worth, at the time of the sale, five hundred dollars.

The testimony very clearly proves that the conduct of Jewitt, however humane his motives were, prevented competition at the sale. Through his representations, the property of the complainant was sold at a great sacrifice. His appeals to the sympathies of the bystanders were well calculated to prevent them from bidding for the land. This was against public policy. The law provides, in various ways, for a fair competition in sales made by its authority, and whatever prevents it is a fraud on the sale: *Jones v. Caswell*, 3 Johns. Cas. 29 [2 Am. Dec. 134]. It is also a fraud on the debtor and his remaining creditors, by depriving the former of the opportunity of obtaining a full equivalent for the property, which is devoted to the payment of his debts: *Id.* If underbidders or puffers are employed at an auction to enhance the price and deceive other bidders, and they are in fact misled, the sale will be held void as against public

policy. The reason is, that a fair competition is prevented. The parties do not meet on equal terms. The same equitable principle must prevail, where competition is prevented by any combination or trick, on the part of the bidders, to the serious injury of the debtor: *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Id. 444. The omission to file a replication can not, under the circumstances, be assigned for error. The defendant, having consented to submit the cause on bill, answers, and depositions, must be considered as having waived it: *Demaree et al. v. Driskill*, 3 Blackf. 115.

We are of opinion that the sale referred to in the bill was a fraud on the complainant and must be set aside. The purchase was made by Jewitt as the agent of Cole and with his money. Cole is not an innocent purchaser; he is affected by the acts of his agent. He is, however, entitled to be refunded the purchase money, which was applied to pay the complainant's debt.

The court reversed the decree with costs, and decreed that the sheriff's sale was void, but that Cole should retain a lien on the land for the money paid by him, etc.

A PURCHASER AT AN EXECUTION SALE who by his representations has discouraged bidding thereat, and so has obtained the property at an undervalue, will have his purchase avoided at the instance of the execution debtor or of his judgment creditors who may be injured: *Plaster v. Berger*, 5 Ind. 234; *Gilbert v. Carter*, 10 Id. 17. But for whatever cause a purchase at execution sale be set aside, the purchaser will be allowed a lien upon the land for what he may have paid: *Seller v. Lingerman*, 24 Id. 267.

CASES
IN THE
SUPREME COURT
OF
IOWA.

WILSON v. WEBSTER.

[MORRIS, 812.]

SALE OF IMPROVEMENTS ON PUBLIC LANDS is a valid and sufficient consideration for a promise to pay.

WHERE PART OF THE CONSIDERATION OF A DEED IS GOOD there can be no apportionment, though part may fail. Thus if several parcels of public lands are sold, on some of which are improvements and on some not, the sale of the first is a sufficient consideration for the note given to represent the purchase price of all.

ASSUMPTION on a promissory note for one thousand and twenty-five dollars. This note represented in part the price agreed to be paid by plaintiff in error, to defendant in error, upon the sale by the latter to the former of certain lots of public land then in his possession. The sale was consummated by the execution of a quitclaim deed and a delivery of possession. Part of the lots sold were under inclosure and were improved; the others were contiguous to the inclosure and were unimproved. The jury brought in a verdict for defendant in error, plaintiff below. The grounds relied upon for a reversal appear in the opinion.

Reid and Johnson, for the plaintiff in error.

Henry W. Starr, contra.

By Court, **MASON, C. J.** The only exception taken to the proceedings below by the plaintiff in error is in relation to the instructions of the court to the jury. Six several instructions were asked by the counsel for the plaintiff in error and refused,

either wholly or in part. All these, except the fifth, are of two classes: 1. Those calling for a decision that the sale of improvements on the public lands was an insufficient consideration for a promise; 2. That it was an illegal consideration, and that the law in neither case would compel the payment of a note given therefor. Both these points have been frequently decided by this court, and the ruling of the court below was in perfect accordance with those decisions: *Freeman v. Holliday*, Morr. 80; *Hill v. Smith*, Id. 70; and *Stannard et al. v. McCarty*, Id. 124. The only question we need to consider, therefore, is that raised by the fifth instruction asked, and the charge of the court thereupon. That instruction was as follows: "That if the jury were satisfied that there were improvements on a part only of the lots so sold and conveyed, they were bound to find a verdict for the plaintiff only for the proportionate value of the lots on which there were improvements at the time of the execution of said note." The court refused to give this instruction in the precise terms in which it was asked, but charged the jury that if the lots constituted one tract, an improvement on one might inure to the benefit of all, but otherwise if the lots constituted separate and independant tracts. The last branch of this charge is in accordance with the instruction asked. The plaintiff in error could not, therefore, except to it, so that it need not now be considered.

By the first branch of the charge we understand the court to have ruled that, where a person is in possession of one entire tract of public lands having an improvement on a portion thereof, a quitclaim deed for the whole constitutes a good and valuable consideration for a promise, and a note given therefor can be collected in full. We think that instruction was clearly correct. We go further, and say that the same would have been the result had the quitclaim deed embraced other distinct and independent tracts, on which there were no improvements, if no deception was practiced upon the purchaser. The rule contended for by the counsel for the defendant in error is a sound one, that where there is no fraud or misrepresentation the consideration is not to be apportioned. Where there is no consideration the contract will not be enforced, but a defendant can not successfully resist the payment of a promissory note on the ground of inadequacy of consideration. He must be the judge of that matter at the time of making the contract.

Suppose then, that Wilson had given this note in consideration of a quitclaim deed from Webster for lots, in some of

which the latter had an interest, and in others not—there being no fraud or deception practiced, and Wilson all the while understanding the facts precisely as they existed. The conveyance of the interest which Webster held would, in that case, constitute the entire consideration of the contract. Wilson, who is presumed to know the law, would understand that a quitclaim to lots in which Webster had no interest conveyed nothing. If, therefore, Webster had no transferable interest in the lots on which there were no improvements—no deception being practiced upon Wilson—the latter will be presumed to have given his note for the lots on which the improvements were located. He can not now object to the payment of the note because these lots were not worth the amount he has stipulated to pay for them. There is no proof or pretense of any fraud or deception having been practiced upon Wilson in the present case, and he must, therefore, perform his promise in the shape in which it was made.

Judgment affirmed.

SALE OF IMPROVEMENTS ERECTED ON PUBLIC LANDS of the United States forms a good consideration for a promissory note given for their price: *Estell v. Bridger*, 36 Am. Dec. 683.

SLEETH v. MURPHY.

[MORRIS, 231.]

DEMURRER TO A PLEADING ADMITS that the facts therein set forth are true.

STATUTE OF LIMITATIONS IS UNAVAILABLE ON DEMURRER; it must be pleaded though it appear on the face of the declaration that the cause of action did not accrue within the time provided by law, within which the action must be brought.

STATUTE OF LIMITATIONS THAT GOVERNS IS THAT IN FORCE AT THE TIME of the plea thereof; and though at the time that the action is brought it is barred by the provisions of the existing statute, the plea thereof is unavailing, if subsequently, before any plea is interposed, the time of limitation is extended so as to take the case out of the statute.

ASSUMPSIT. The opinion states the case.

Grimes and Starr, for the plaintiff in error.

Rorer, contra.

By Court, MASON, C. J. The summons in this case was issued May 20, 1843, and served the same day. On the twenty-third of June following, a declaration was filed, containing two counts;

the first special, the second comprising the common counts. The first alleges the indebtedness to have accrued in March, 1838. The second states that on the first day of June, 1838, the defendant was indebted in the further sum, etc. On the nineteenth day of October, 1843, the defendant pleaded the statute of limitations; that he did not undertake and promise, etc., "at any time within five years next before the commencement of this action." To this plea there was a demurrer, which was overruled, and this overruling of the demurrer is now assigned for error. The counsel for the plaintiff contend that the court below in making the decision just referred to erred for two reasons: 1. The plea was to the whole declaration, and though a good plea to the first count, was bad as to the second, which lays the cause of action on the first of June, 1843, and is for goods sold and delivered. 2. The plea was bad to the first count, inasmuch as there was no limitation of this action to five years at the time of plea pleaded.

The first of the above reasons is wholly unsubstantial. In trying an issue in law, we do not investigate facts. The demurrer admitted the truth of the plea which alleged that the whole cause of action had accrued more than five years prior to the bringing of the suit. The time alleged in the second count of the declaration is not decisive of the true time when the indebtedness arose, and even if it were, that fact would not be available on demurrer. But the second reason given above we regard as sound and sufficient. The law in force at the time the suit was commenced limited the time within which such actions should be commenced to five years. But the act of the fifteenth of February, 1843, and which took effect on the fourth of July following, extended such limitation to six years. This law was therefore in force when the plea was pleaded. Which is to govern, the law in force at the time of bringing the suit, or that when the plea was pleaded? The natural conclusion upon reading the statute would indicate that the case would be under control of the former law. The statute in force when this suit was brought, declares that actions of this kind "shall be commenced within five years next after the cause of action shall have accrued, and not after." This would seem to be a prohibition against commencing such suit after the expiration of five years from the accruing of the cause of action, and consequently a plea setting forth such lapse of time would seem to be sufficient.

But in such a case a demurrer ought to lie to the declaration where the lapse of more than five years should appear from

the declaration itself, as is the case in relation to the first count of the declaration in the present instance. Now, although such would be the natural construction of the language of the statute, we feel controlled in this matter by the decisions of other courts on like statutes. It has been of late years invariably held that a statute of limitations must be pleaded; that a demurrer will not lie, although the lapse of a sufficient time between the accruing of the action and the commencement of the suit should appear from the face of the declaration. If, then, a plea be necessary, it seems to us that the matter of defense set forth in such plea must be valid and available at the time of pleading the same.

It has also been held by the highest judicial authority in this country that statutes of limitations applied merely to the remedy, and that changes in such statutes took effect upon antecedent contracts. If such be the case, then all proceedings to enforce the remedy in such cases, which take place after the new law becomes in force, must be in accordance therewith. We think, therefore, the five-year limitation pleaded in this case was not, at that time, a sufficient defense, and the demurrer thereto should have been sustained.

Judgment reversed and case remanded.

See *contra*, *Davis v. Minor*, 28 Am. Dec. 325, which holds a statute reviving a barred debt unconstitutional, and cases in note.

In many of the United States, if the declaration shows that the plaintiff's action is not brought within the time allowed by law, the defendant may demur, and need not avail himself of the statute by answer: *Coles v. Kelsey*, 2 Tex. 541; *Hudson v. Wheeler*, 34 Id. 356; *Moulton v. Walsh*, 30 Iowa, 361; *Smith v. Hall*, 19 Cal. 85; *Smith v. Richmond*, Id. 476; *Barringer v. Warden*, 12 Id. 311. This is the rule prevailing in chancery: *Angell on Lim.*, sec. 294; *Humbert v. Trinity Church*, 7 Paige, 195; *Van Hook v. Whitlock*, Id. 373. But at law, especially in states which have not adopted the reformed code of procedure, the rule still prevails that the defense of the statute of limitations must be made by answer, and not by demurrer: *Angell on Lim.*, sec. 285.

UNITED STATES v. MORGAN.

[MORRIS, 341.]

INDICTMENT FOR PERJURY MUST SHOW PARTICULARLY TO WHAT FALSEHOOD the defendant has sworn; it is too indefinite to say that the defendant made oath to a false schedule in bankruptcy, where that schedule relates to a great variety of facts.

INDICTMENT for perjury. Defendant interposed a demurrer to the indictment, which was sustained. The plaintiff appealed. The opinion states the other facts.

L. D. Stockton, for the plaintiff.

Hall and Shuffleton, contra.

By Court, WILSON, J. The technicality and precision required at one period by the courts of England having been found to operate as a denial of justice, were abandoned by those courts, and the courts of this country have gone still further in simplifying and abbreviating the forms in criminal proceedings. Nothing further is now required than a plain statement of the accusation; a setting forth of those matters in which the guilt of the accused is alleged to consist. The indictment should apprise the defendant of what he is called upon to answer. In going thus far courts have but followed the light of reason, but were they to go further than this and say that an indictment is sufficient which does not set forth the circumstances in which the guilt of the accused consists, evils would follow far greater than those which resulted from the decisions of the English courts when they went into the opposite extreme. Does the indictment in this case set forth sufficient to enable the defendant to prepare his defense? We think it does not. The only assignment of perjury is that the schedule was false and incorrect. This is too general—too uncertain. It should have set forth wherein the schedule was false and incorrect. The indictment sets forth that “the defendant filed with his petition, as part of the same, a schedule purporting to set forth, to the best of his knowledge and belief, a list of his creditors, their respective places of residence, and the amount due by the said Morgan to each of them, together with a pretended accurate inventory of the property, rights, and credits of said Morgan of every name, kind, and description, and the location and situation of each and every parcel and portion thereof; his, the said Morgan’s wearing apparel, and that of his wife and children excepted.” It further sets forth that “said Morgan appeared before John A. Pitzer, the clerk of the district court aforesaid, and did falsely and corruptly swear that said petition was true, according to the best of his knowledge and belief, whereas, in truth and in fact, said schedule was false and incorrect.”

Did the falsehood consist in, first, leaving out some of his creditors? If so, who were the persons omitted? Or, secondly, did it set forth certain persons as creditors who were not really so? If so, who were they? Or, thirdly, did it incorrectly set forth the place of abode of the persons represented as creditors? Or, fourthly, was the amount alleged to be due to all or any one of

them incorrect? Or, fifthly, was the inventory of the property, rights, and credits of said Morgan incorrect in amount? Or, sixthly, in the location of such property, rights, or credits? Or, seventhly, in the description of them? Or, eighthly, was the inventory of his wearing apparel and that of his children and family false and incorrect?

To require a defendant to stand prepared at all of these points upon this indictment would be unjust and oppressive in the extreme. We think the indictment can not be sustained.

Judgment below affirmed.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

MITCHEL'S ADM'R v. MITCHEL.

[4 B. MONROE, 380.]

COVENANTS IN MARRIAGE ARTICLES, INTENDED TO SURVIVE THE MARRIAGE, and not to be performed until its termination, do not come within the principle by which the marriage of a woman to her debtor is an extinguishment of the debt.

AFTER THE WIFE'S DEATH, THE RIGHT OF ACTION TO ENFORCE SUCH COVENANTS survives to her personal representatives, and not to her legatees.

DECLARATION IN AN ACTION BY A WIFE'S ADMINISTRATOR TO ENFORCE MARRIAGE ARTICLES, by which the husband covenanted to perform certain dispositions by will, to be made by her, need not allege non-performance of such dispositions by non-payment to her legatees.

COVENANT. The facts appear in the opinion.

Owsley and Goodloe, for the plaintiff.

By Court, **MARSHALL, J.** By marriage articles entered into between **McLin Mitchel** and **Mrs. Lucy Owens**, it was stipulated that, after the marriage, Mitchel might possess and dispose of certain property of Mrs. Owens, valued at four hundred and ninety-five dollars. And Mitchel bound himself to pay Mrs. Owens that sum, without interest, when she desired it. She was also authorized to will and dispose of said sum as she pleased, in case of her dying first, and he covenanted to abide by and perform such will. And, in case of his dying first, he acknowledged his estate to be indebted to her in the above named sum, and bound it to her for that sum, if she should choose to claim it. It being intended, as the articles recite, in consequence of both parties having children, that she should retain the right to dispose of

that sum. The declaration, which recites the instrument at large, avers that the marriage took place; that Mitchel afterwards took possession of the property referred to, and used and disposed of it as he pleased; and that Lucy Mitchel (formerly Owens) had departed this life, leaving a will, which has been duly recorded, whereby she bequeathed the said sum of four hundred and ninety-five dollars, owing from said McLin Mitchel, to divers legatees, and avers, as a breach, the non-payment of said sum to the said Lucy in her life-time, or to the plaintiff since her death. A demurrer to this declaration having been overruled, and judgment thereon rendered for the plaintiff, the defendant seeks a reversal in this court; and now urges: 1. That the covenant was extinguished by the marriage; 2. That if not, the right of action, on the death of the wife, did not belong to her administrator but to her legatees; and, 3. That if this be not so, the declaration is insufficient in not alleging non-payment of the legacies to the legatees.

1. Whatever may be said of the particular covenant to pay the sum of four hundred and ninety-five dollars to Mrs. Owens, we think it entirely clear that all the other stipulations on the part of Mitchel, being obviously intended to survive the marriage, and to be performed after its termination, do not come within the principle on which the marriage of a woman to her debtor is held to extinguish the debt. Such covenants are not extinguished by the marriage, and may be enforced at law: *Milbourn v. Ewart*, 5 T. R. 381.

2. We are also of opinion that the right of action vested, on the death of the wife, in her personal representative and not in the legatees. The covenant is to, and with the intended wife, personally, and like other contracts entered into with her before marriage, and remaining to be enforced after its termination by her death, the legal interest and right of action in it passes to her administrator. Indeed those stipulations which were not to be performed until the death of the wife, and it is upon these that the action is founded, may be regarded as impliedly made with her administrator. And this seems to be especially the case with regard to the covenant to perform the will, since the executor or administrator, with the will annexed, is responsible for the execution of the will to those interested. He is also responsible for payment of debts which may be chargeable against the estate of the deceased wife. And as this instrument, in establishing the right of the wife to dispose of this sum of four hundred and ninety-five dollars, by will, does,

upon her death, after disposing of it by will, make it her estate, it passes to her personal representative, subject to her debts, if she has any, and it is only through him, as in ordinary cases, that the legatees can claim. Here is no express covenant to pay the legatees, and even if there had been, it is a settled doctrine and particularly applicable in the case of indentures or deeds *inter partes*, that if, in such an instrument, A., a party, covenant with B., a party, to pay a sum of money to C., a stranger, the right of action for the breach of this covenant is in A. and not in C.

But, as already stated, there is no express covenant to pay the legatees, but only to abide by and perform the will. Nor does it appear that even, by her will, the decedent directed her husband to pay to the legatees, but the averment is that she bequeathed the said sum of four hundred and ninety-five dollars to divers legatees. As, by the marriage articles, this sum of four hundred and ninety-five dollars, in the hands of the husband, is made subject to the disposition of the wife by will, and became, upon her death, after disposing of it by will, a part of her estate, vesting in her personal representative as such, the bequest of portions of it to A. and B., etc., is to be regarded as directory to the personal representative to pay such portions to A. and B., etc. And the covenant of the husband to abide by and perform the will, must be construed as a covenant to pay to the personal representative, who is responsible to legatees and creditors for the due execution of the will.

The result of this construction is, that the husband is indebted to the administrator, and not to the legatees of the wife, and that even if his payment to the legatees might, under particular circumstances, be an equitable or a substantial discharge, he has, *prima facie*, no legal right thus to discharge his debt or his covenant. It was not necessary, therefore, to negative such mode of discharge in the declaration, but the breach of covenant is sufficiently shown by the averment of non-performance to the administrator, who, alone, was legally entitled to demand and receive its performance. If payment had been made to the legatees under the circumstances which justified it and constituted it a discharge of the covenant, the facts might and should have been pleaded.

Wherefore the judgment is affirmed.

THOMPSON v. CRAIGMYLE.

[4 B. MONROE, 391.]

GROWING CORN IS A CHATTEL, AND SUBJECT TO SALE under execution.

PURCHASER OF GROWING CROP, SOLD UNDER AN EXECUTION, may enter and remove the crop purchased, although the same is in the possession of a third party, under an arrangement with the judgment debtor, made for the purpose of defrauding the latter's creditors.

TRESPASS. The opinion states the facts.

Morehead and Reed, for the appellant.

Gates and Lindsey, for the appellee.

By Court, BRECK, J. Septimus Craigmyle, the appellee, brought an action of trespass *quare clausum fregit*, against Thompson, the appellant, and recovered a judgment for forty-three dollars, from which Thompson has appealed to this court. The testimony, upon the trial, conduced to prove that the plaintiff was in possession of the field upon which the defendant had entered and cut and carried off the crop of corn; that J. W. Craigmyle was also living upon the farm, of which the field in contest composed a part, and had assisted in making the crop. The testimony also conduced to prove a fraudulent sale and conveyance of the farm by J. W. Craigmyle to the plaintiff, and a fraudulent arrangement between them for its cultivation. It further appeared that under an execution in favor of the defendant against J. W. Craigmyle, the field of corn had been sold by a constable and the defendant became the purchaser. This sale was made on the fourteenth of October, 1842.

Upon this state of case, the court, on motion of the plaintiff, instructed the jury, "that they were bound to find for the plaintiff, provided they believed, from the evidence, that the field in which the corn in contest was cultivated, and where the trespass was charged to have been committed, was in possession of the plaintiff at the time it was entered upon by the defendant, and that in estimating the damages they had a right to take into calculation the value of the corn taken off by the defendant, provided they believed it the plaintiff's corn." 2. "That if the jury believed, from the evidence, that the plaintiff was in the peaceable possession of the close, on which the trespass complained of in the action was committed, with the assent of the rightful owner, and that the defendant broke said close and entered upon his possession without his consent and against his express order, the law is for the plaintiff." The questions for the consideration of this court are involved in these instructions. To test their cor-

rectness, we will state the legal propositions which we regard as applicable to this case.

And 1. Corn standing in the field is subject to sale under execution. It was so settled by this court in *Parham v. Thompson*, 2 J. J. Marsh. 159. It is a chattel and may, therefore, be sold by a constable. 2. A purchaser under execution may lawfully enter and remove the corn purchased, provided the corn, when sold, belonged to the defendant in the execution and the sale was valid. Nor could the defendant in the execution, nor any person who might be in possession under him, maintain trespass, provided the purchaser merely entered and removed the corn. The plaintiff in this case, therefore, was not necessarily entitled to a verdict. He might have been in possession and still not the owner of the corn nor the land. If the purchase of the farm by him from J. W. Craigmyle, and the arrangement for cultivating it, were fraudulent—made for the purpose of covering it up and shielding it and also the crop from the creditors of J. W. Craigmyle, the whole proceeding, as to his creditors, was void, and the plaintiff acquired thereby no title to the land, nor right to the crop, nor to the possession. Although the plaintiff, therefore, may have been in possession of the field when the defendant entered and cut and removed the corn, yet such possession merely would not enable him to recover in this action. We are of opinion, therefore, that the court erred in the instructions given to the jury, on the motion of the plaintiff.

Wherefore, the judgment is reversed and the cause remanded, that a new trial may be granted and further proceedings had consistent with this opinion.

GROWING CROPS MAY BE LEVIED UPON AND SOLD under execution, and the purchaser may lawfully enter for the purpose of removal: *Whipple v. Foot*, 3 Am. Dec. 442; *Penhallow v. Dwight*, 5 Id. 21; *Coombs v. Jordan*, 22 Id. 236; *Smith v. Tritt*, 28 Id. 565; *Brittain v. McKay*, 35 Id. 738, and cases cited in note; *Heard v. Fairbanks*, 38 Id. 394.

DIVINE v. MITCHUM.

[4 B. MONROE, 488.]

REAL ESTATE, PURCHASED BY A FIRM AS PARTNERSHIP PROPERTY, is liable to the payment of the partnership debts.

ADVANCEMENTS MADE BY ONE PARTNER TO THE FIRM, and all other firm debts, must be first discharged out of the firm property, whether real or personal, before recourse can be had to the same by the individual creditors of a partner.

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PARTNERSHIP realty. The opinion states the facts.

Morehead and Reed, for the plaintiffs.

By Court, BRACK, J. William Oldham and John Mitchum, in 1833, made a joint purchase of a lot, in the town of Versailles, with a steam mill and cotton factory thereon, and engaged as partners, under the firm and style of Oldham & Mitchum, in the manufacture of flour and meal and cotton yarns. Mitchum, for large advancements alleged to have been made, for and on account of the partnership, and in the purchase of the property, claims a prior lien upon it, over the mortgagees and attaching creditors of Oldham, for his individual liabilities. The validity of the claim thus set up by Mitchum constitutes the important question for determination.

The facts, as to the advancements by Mitchum for the firm, in the prosecution of the partnership business, and in the purchase of the property in contest, and also as to the validity of the claims, as against Oldham individually, asserted by his mortgagees and attaching creditors, having been agreed by the parties, the next inquiry is, whether the property belonged to the firm as partnership property? The proof is that it was a joint purchase of the property, each paying an equal proportion of the purchase money, except as to about six hundred dollars of Oldham's half, for which he and Mitchum gave their notes, the latter as security, and which were subsequently paid, in part, by the firm, and the residue by Mitchum. The conveyance was made to them jointly. Mitchum alleges that the property was joint stock property, and belonged to the firm of Oldham & Mitchum. This allegation is not denied by the adverse claimant. The fact is agreed, on the part of the mortgagees, that at the date of the mortgage, they knew the property was used as joint property of the firm of Oldham & Mitchum. In view of all the facts and circumstances, without further inquiry, we think it may be assumed that the property was purchased with a view to constitute it joint stock of the firm, and that it was so considered, treated, and held. Regarding it as such, has Mitchum a prior lien upon it to be reimbursed for his advancements before the mortgagees and individual creditors of Oldham can come in? The question, we apprehend, has not been decided by this court, and so far as it depends upon a concurrence of authority elsewhere may be regarded as unsettled.

That one partner has an equitable right to have his own claims upon the firm, for advancements and also all the firm debts dis-

charged out of the personal estate of the firm, before the assignee or separate creditor of the other partner can come in, has long been recognized as the settled law. But whether this equitable rule should be applied to the real estate of partners, is a question upon which there have been conflicting opinions and decisions both in England and this country. Of eminent English chancellors Lord Thurlow has been on one side and Lord Eldon upon the other of this vexed question. The former is reported at first to have said, in the case of *Thornton v. Dixon*, 3 Bro. C. C. 198, "he had always understood that when partners bought lands for the purpose of a partnership concern, it was to be considered as part of the partnership fund," and that consequently the real estate in that case must be considered as personal estate, and distributable as such. Upon reargument, however, his lordship changed his opinion. The contest in that case was in reference to land upon which mills had been erected for partnership purposes, the partners being paper makers. The property was used in the business of the concern, and was, therefore, like the one under consideration, a very strong case in favor of the principle of regarding the property as personal estate. The question in the case referred to arose between the surviving partners and the representatives of a deceased partner. *Balmain v. Shore*, 9 Ves. 500, and other English cases might be cited based upon the opinion of Lord Thurlow in *Thornton v. Dixon*.

Lord Eldon is reported to have entertained a different opinion and to have said, in the case of *Sellrig v. Davies*, 2 Rose, 97, "that all property involved in a partnership concern ought to be considered as personal," and afterwards, in the case of *Towns etc. v. Devines etc.*, reported in appendix to Montague on Partnership, so decided—*vide* note to the case of *Thornton v. Dixon* and the authorities there referred to. This subject is also very fully examined by Gow on Part. 47-52, and the opinions and decisions of English and American jurists referred to. Also by Chancellor Kent, 3 Kent's Com. 37-45.

In America, the decisions upon the question have also been conflicting. In New York, in *Coles v. Coles*, 15 Johns. 159 [8 Am. Dec. 231], and the same principle has been recognized in other cases, it was decided that the rules and principles which govern and regulate the disposition of partnership property, did not apply to real estate, and in the absence of special agreements between the parties, real estate owned by partners was to be considered and treated as such, without any reference to the partnership. A more qualified view of the subject has been

taken by the judiciary of Virginia and Pennsylvania, in *Forde v. Herron*, 4 Munf. 316; *McDermot v. Laurence*, 7 Serg. & B. 438 [10 Am. Dec. 468]. In South Carolina and Connecticut real estate owned by partners is considered and treated as personal estate: *Winslow v. Chiffille*, Harp. Eq. 25; *Robinson v. Crowder*, 4 McCord, 519 [17 Am. Dec. 762]; *Sigourney v. Munn*, 7 Conn. 11.

The only plausible reason which we have anywhere seen advanced, for the distinction taken between the real and personal estate of partners is, that as to real estate the attention of the purchaser is directed to the record, which is presumed to furnish correct information as to title. But not so as to personal estate, the title and right to which are presumed to be with the possession. We will not undertake to decide that cases may not occur in which the reason assigned in favor of a *bona fide* purchaser, without notice, would not be entitled to weighty and controlling consideration. But we are of opinion this case is not of that character—the property in contest was used in the business of the firm—the partnership was constituted for the very purpose and object of using it. That it was in the possession and used as the joint property of the firm, was known to the mortgagees before they obtained their mortgage from Oldham.

In view of the whole case, we are of opinion that the property in contest should be treated as personal estate and be first subjected to the payment of the claim of Mitchum, and such being the decree of the court below, it is therefore affirmed.

PARTNERSHIP INTERESTS IN REAL ESTATE, GENERAL NATURE OF: See *Yeatman v. Woods*, 27 Am. Dec. 453, and note; *Greene v. Greene*, 13 Id. 642, in the note to which this subject is considered at length. See also *Wheatley's Heirs v. Calhoun*, 37 Id. 654, and note, citing the prior cases in this series.

PRIORITY OF PARTNERSHIP CREDITORS AS TO PARTNERSHIP ASSETS: See *Payne v. Matthews*, 29 Am. Dec. 738, and note; *Grosvenor v. Austin*, 25 Id. 742, and note, in which the prior cases in this series are collected.

CONWELL v. BROOKHART.

[4 B. MONROE, 580.]

GRANTER OF THE PRIVILEGE OF LOCATING A MILL DAM and constructing a race for the purpose of supplying his mill with water, having once selected his site and erected his dam, is not restricted to such location if it afterwards turns out to be impracticable for the purposes intended.

TRESPASS LIES AGAINST HUSBAND AND WIFE for a wrongful act committed by them jointly.

PRIVILEGE OF CONSTRUCTING A DAM AND MILL-RACE IS A FRANCHISE, but after such construction the dam and race become property, for the destruction of which trespass will lie.

RIGHT TO CONSTRUCT A DAM ON THE LAND OF ANOTHER, implies the right to the exclusive use and possession of as much land as may be necessary for such purpose.

TRESPASS. The opinion states the facts.

Grigsby, for the plaintiff.

Woolley, for the defendants.

By Court, MARSHALL, J. Conwell brought an action of trespass *quare clausum fregit*, against the defendants in error, for the destruction of his mill dam, and for filling up and obstructing his mill-race. Judgment for the defendants, upon the instruction of the court to the jury to find as in case of a nonsuit, and Conwell has brought the case before this court, for revision.

The testimony, upon the trial, conduced to establish the following facts: That in 1818, Henry Shoptaugh conveyed to Joseph Forman the use of the water of the east fork of Cox's creek as it passed through Shoptaugh's land, and the privilege of building and continuing a mill-dam across said creek, a small distance above where the road leaves the Bardstown road and leads up said fork, crosses the same the first time, in any place and in any manner that may best suit said Forman, so as to get the entire benefit of the water, also the privilege of erecting and continuing a mill-race from the said dam, etc., and said Shoptaugh reserves the privilege of fencing on the side of the race, and bridging across it so as not to obstruct the passage of the water or to injure the race. This deed was made in consideration of three hundred dollars, and duly recorded.

Shoptaugh subsequently sold the land to W. Shoptaugh and P. Rowner, W. Shoptaugh to Rowner, who sold a part of it to Forman and part to S. Cassell; that shortly after the conveyance from H. Shoptaugh to Forman the latter constructed a dam as authorized by the conveyance. The banks of the creek, above where the dam was built, being low, gave way and the water passed off in new lateral channels. To prevent this, side dams were constructed: but the bed of the creek having changed, the first dam proving ultimately wholly insufficient, from its locality, to secure the benefit of the water of Cox's creek, for the use of Forman's mills, a new dam was erected and a new race cut. This new dam was erected upon the land owned by H. Shoptaugh at the date of his conveyance to Forman and upon

that portion of the tract which had afterwards been conveyed to Cassell by Rowner. It seems to have been "above where the road that leaves the Bardstown road crosses the creek the first time;" the exact distance does not appear, but it appears to have been about one hundred and fifteen poles from the old dam. The race from the dam or a portion of it was upon the land conveyed by Rowner to Forman. Forman died about 1838, and devised his mills to his two sons, William and Joseph, who had constructed the new dam and race. Subsequent to their construction, they had sold to defendant, Brookhart, that portion of the H. Shoptaugh tract of land which had been owned by and devised to them by their father, and upon which they had constructed the new race. All the deeds of conveyance contained reservations as to the mill-dam and race of Forman, and the deed from W. and J. Forman to Brookhart reserves the mill-race and the right of keeping it and the mill-dam in repair where they then were. This conveyance was made after the new dam was erected and the new race dug.

It appears that the new dam and race were less injurious to the H. Shoptaugh tract of land than the first dam and race, as the effect would be to confine the creek in its original channel and prevent its breaking through its banks. It was also in proof that Conwell, the plaintiff, had been in possession of the mills, race, and dam, for ten or fifteen years, first under the father and subsequently under the sons, of whom he afterwards purchased; that Cassell had died, and his widow had married the defendant, Brookhart, and was herself a defendant: and that the defendants had torn down the new dam and filled up the race; that Cassell was in possession of the tract of land upon which the new dam is erected, and that his children, who were infants, and widow and her husband, the defendant, have since continued in possession. It further appears from the record, that the court ruled the plaintiff to elect for which trespass he would go, as the pulling down the dam and filling up the race were on different days, and he could only go for one of the trespasses. The plaintiff elected to go for the pulling down the new or upper dam. Upon this state of the case the court, on motion of defendants, instructed the jury to find as in case of a nonsuit, and the jury found accordingly. The instruction seems to have been based upon the idea that Forman, having once selected a site for his dam, that he was thereby precluded from ever afterwards changing it. Whether, in that view of the case, the instruction was right will first be considered.

The object of the purchase from H. Shoptaugh, by Forman, was the entire benefit of the water of Cox's creek, so far as it passed through Shoptaugh's land. A very ample consideration seems to have been paid for it, equal to one half of what the entire fee simple in the whole tract sold for a few years afterwards. The terms of the deed are comprehensive, and leave no room for doubt that it was the intention of the parties to secure to Forman the entire benefit of the creek. The terms of the grant are express. If the grant had not also secured to Forman the right of using the requisite means to realize the main object of the grant (the use of the water), the law would have implied the right; and if dams and races were the necessary and proper means for securing to Forman the benefit of the water of Cox's creek, so far as it passed through the land of Shoptaugh, he would have acquired the right to construct them whether expressed in the deed or not.

The doctrine upon this point is very fully examined and illustrated in *Beard v. Smith*, 6 Mon. 430. But the parties have not left to implication the rights of Forman in reference to the means to be used, but the right of building and continuing a dam and a race are expressly granted. "To build and continue a dam a small distance from where the road, etc., crosses the creek or fork, the first time, at any place and in any manner that may best suit said Forman so as to get the entire benefit of the water." Terms more direct and comprehensive could not well be employed, and as it became entirely impracticable to secure to Forman or his devisees the benefit of the water by the dam first erected, we are very clearly of opinion that he was authorized by the grant to build and continue another at any place and in any manner that might be necessary to get the entire benefit of the water, providing it was upon the land of Shoptaugh when he made the grant, and within a small distance above where the road crosses the fork, etc.

It does not appear that the new dam was not within the requisite distance from where the road crossed the stream, nor would we be understood as deciding that if indispensable to secure the enjoyment of the water, that the grantee would not be authorized to construct a dam even farther than a small distance from where the road crosses the creek. We are not inclined to regard the expression, a small distance above where the road crosses, etc., as a controlling and unyielding limitation or restriction, when taken in connection with the whole grant. The expressions that immediately follow, very clearly imply that not only the

convenience of the grantee, but the securing the entire benefit of the water were to be the paramount considerations in the situation of the site for the dam, and the mode of building. But we will pursue this inquiry no further, as it is only necessary to decide in this branch of the case that the grantee, having once selected a site and erected his dam, was not thereby restricted to that spot if found impracticable to secure, by such dam, the benefit of the water.

But there are other grounds upon which it is insisted, the nonsuit ought to be sustained: 1. That the defendants, being husband and wife, can not be sued together for a joint trespass. 2. That the plaintiff misconceived his action—that it should have been case. Waiving the question whether a misjoinder of husband and wife, as defendants, in an action of trespass, would, under any circumstances, be ground for a nonsuit, we are entirely satisfied that upon that ground the motion for a nonsuit can not be sustained in this case. The testimony proves that the trespass was committed jointly by the defendants, and the law is well settled that in such case the action lies against both. Upon the second point we have some doubt. It is urged that the privilege of enjoying the benefit of the water is a mere franchise, for the interruption or disturbance of which case is the proper remedy. The right to the use of the water is no doubt a franchise, and so is the right to erect the dam and prepare the race, but when the dam is erected, it becomes the property of him who has the right to construct it. It is not incorporeal in its nature, but is material, tangible as much as a house, and for the destruction of it we have no doubt that trespass would lie. It was so held in *Wilson v. Smith et al.*, 10 Wend. 324. In that case the legislature had granted plaintiff the privilege of constructing a dam across a particular stream. He erected the dam and the defendants demolished it, for which he brought an action on the case—held that trespass, not case, was the proper remedy. In this case, however, the action is trespass *quare clausum fregit*, but we have come to the conclusion the action will lie.

The right to erect and continue the dam very clearly implies and is in effect the right to the exclusive use and possession of so much of Shoptaugh's land as may be necessary for that purpose. When the dam is erected, the ground upon which it stands is thereby appropriated to the use of the builder, and so long as the dam continued in use for the purpose for which it was built, the right of possession of the dam and of the possee-

sion and use of the ground which it occupies, is in the grantee. How the dam in this case was constructed, does not appear—whether of wood, or earth, or stone, or in part of each: but no matter how constructed, the principle would be the same. If all of earth, a separate interest in it, the right of possession, and indeed the right of property, in view of the object for which it was erected, would be acquired by Forman. An entry upon it in such case would be an entry upon his possession, and in effect upon his close; an entry for its destruction would be unauthorized, and trespass *quare clausum fregit* would lie.

The case of *Clap v. Draper*, 4 Mass. 266 [3 Am. Dec. 215], is somewhat analogous in principle to this. In that case it appears that in 1763, Humphrey was seised of the close in fee, and by deed conveyed the same to Fowler in fee. Fowler, at same time, reconveyed to Humphrey the trees and timber standing and growing on the land, with liberty to cut and carry away said trees and timber—that the plaintiff held the right conveyed by Fowler to Humphrey, and the defendants the estate that was Fowler's. The defendants had cut some of the trees standing at the date of the original deed. The defendants and those under whom they claimed, had had the herbage upon the close, and those under whom plaintiff claimed had cut and carried away the trees. The plaintiff brought trespass *quare clausum fregit*, and it was held that it could be maintained, and upon the principle that "when a man has a separate interest in the soil, for a particular use, although the right of the soil is not in him, he may maintain trespass *quare clausum fregit*." The opinion in this case was by a very distinguished jurist, Chief Justice Parsons, who refers to numerous authorities, and examines the subject very fully. But it is further insisted by the counsel for the defendants, that the new dam was not erected for twenty years after the erection of the old one, and that the right of those claiming under Forman, to erect it, if such a right had ever existed after the erection of the first dam, was barred by lapse of time. The testimony conduces to prove the lapse of twenty years from the erection of the first to the erection of the dam in question: but it also appears that the lateral dams had been erected, and near the new dam, from time to time, and within twenty years, and without objection, to keep the water in the original channel. Such continued acts and efforts to secure the enjoyment of the object of the grant of Shoptaugh, having been invariably acquiesced in, as was also the erection of the new dam, by those claiming the land, would,

we think, prevent the effect of the lapse of time, if without them and under other circumstances, which we do not admit, it could be rendered available. But in any view of this question, the instruction should not have been peremptory, but hypothetical.

In the consideration of this case, we have regarded the plaintiff as entitled to all the rights of Forman, and the defendants as occupying no better attitude than Shoptaugh, if he had continued in possession, and never parted with his title.

The judgment is reversed and the cause remanded, that a new trial may be granted, and further proceedings had, consistent with this opinion.

TRESPASS WILL LIE AGAINST THE OWNER OF LAND, who, for a valuable consideration, licenses another to build a bridge on his land, and afterwards interferes with such structure, without the consent of the one who erected it: *Ricker v. Kelly*, 10 Am. Dec. 38, and note, in which the rights of a licensee, as to erections made by permission of the licensor, are considered. See also note to *Rerick v. Kern*, 16 Id. 501.

TRESPASS BY HUSBAND AND WIFE JOINTLY, WHO LIABLE FOR: See *Commonwealth v. Neal*, 6 Am. Dec. 105, and note; *McKeown v. Johnson*, 10 Id. 698.

FARROW v. EDMUNDSON.

[4 B. MONROE, 605.]

AGENT ENTERING INTO POSSESSION OF LAND FOR HIS PRINCIPAL subjects himself to the law applicable to the relation of landlord and tenant, and while in such possession can not deny his landlord's title, by setting up adverse title in himself or third parties.

STATUTE OF LIMITATIONS DOES NOT COMMENCE TO RUN in favor of a tenant, claiming to hold adversely, as against his landlord, until such relation is dissolved, and the landlord is notified of the dissolution.

TENANT'S PUBLICLY CLAIMING LAND AS HIS OWN, selling portions of it, delivering over the possession, and continuing such acts for more than twenty years, will be presumptive evidence of a disclaimer of the landlord's title, and of an adverse holding.

GRANTEES IN POSSESSION OF LAND UNDER CONVEYANCES FROM AN AGENT, given in his own name, or in that of his principal, which possession has been uninterrupted for more than twenty years, will be protected in such possession, and notice and acquiescence on the part of the principal will be presumed.

PRINCIPAL WILL NOT BE PREVENTED FROM OBTAINING THE POSSESSION OF lands held by his agent from the fact that such agent, after judgment of eviction had been rendered against him under a superior title, bought up such superior title, if there was no actual eviction.

ADVERSE HOLDING BY AN AGENT FOR TWENTY YEARS, under a superior title, after notice to the principal, will bar the latter.

PRESUMPTION OF SUCH ADVERSE HOLDING WILL BE REBUTTED if such superior title were purchased with the principal's money.

EJECTMENT. The opinion states the facts.

Robertson and Apperson, for the appellants.

Hanson, for the appellees.

By Court, BRECK, J. As the court below declined giving the instructions to the jury, as moved on behalf of the plaintiff, but gave in lieu thereof, other instructions, designed, as we understand, to embrace the whole law of the case, the main question for our determination is, whether, in the instructions thus given, the court correctly expounded the law. How far the rights of the parties are affected by the operation of the statute of limitations, constituted the most important question upon which the court was called upon to instruct the jury. We will first give our views in reference to this question and then notice more particularly the instructions of the court. If, as the testimony conduces to prove, Colonel Farrow entered and took possession of the land in controversy as the agent of his uncle, Captain Farrow, he thereby became subject to the rules and principles of law applicable to the relation of landlord and tenant. It is true, in some instances his acts may have been consistent and proper in his character as agent, when they would have been otherwise had he occupied the attitude of a tenant merely. But the nature and bearing of such acts on the case, will be noticed hereafter.

There is no rule of law better settled than that the tenant can not controvert, while he continues in possession, the title of his landlord; and upon this principle he is not permitted to set up against the title of his landlord, adversary titles which he may have acquired in himself, or which may be in third persons. These rules are unquestionably applicable to Colonel Farrow and those claiming under him; neither he nor they could protect their possession by merely showing in themselves, or in others, adversary titles, elder or paramount to the title of Captain Farrow. Such titles could not alone be successfully relied upon by the defendants in this case, in bar of the plaintiff's action. Wherever the statute of limitations would bar a right of entry in Captain Farrow or his heirs, the evidences of such elder adversary titles would be unnecessary; the bar would be as complete without them as with them. Not for the purpose of showing an elder adverse title therefore, but for other purposes which will be suggested hereafter, such evidences might be competent as testimony. When the statute of limitations commenced running in favor of Colonel Farrow and those claiming under

him, and against the title of his uncle, will now be considered. As a general rule, it would not commence running so long as the relation of landlord and tenant, or principal and agent existed between the parties; but it would commence whenever that relation was dissolved by Colonel Farrow and his uncle, or those claiming under him, had notice of the dissolution. Whenever Colonel Farrow disclaimed to hold as tenant or agent under the title of his uncle, and claimed to hold adversely in his own right, his uncle would have an immediate right of entry, and the statute would commence running then, or as soon as he had notice of the hostile attitude assumed by his nephew. No definite rule can be laid down as to the proof requisite to establish such notice.

It would depend upon the situation of the parties and the character of the acts upon the part of the nephew, which placed him in a hostile attitude as to the title of his uncle, openly and publicly claiming and treating the land as his own, alienating portions of it in fee, and delivering over the possession, and continuing such acts for more than twenty years, would, we think, after such a lapse of time, justify a presumption of notice from the time he thus placed himself in an attitude of hostility to the title of Captain Farrow. So far as the defendants, or any of them, had purchased from Colonel Farrow, and obtained conveyances from him, in his own name, or as agent and attorney of his uncle, and under such conveyances had enjoyed the possession for more than twenty years, claiming to hold in their own right, as to such defendants, we think they would be protected by their twenty years' possession. In coming to this conclusion we have taken into consideration that Colonel Farrow was the agent of his uncle, settling tenants upon his land, defending against, quieting, and acquiring adversary titles, taking conveyances in his own name. In view of such facts and circumstances, after a lapse of twenty years, notice and acquiescence on the part of Captain Farrow and his heirs, of such sales and conveyances, should be presumed.

If Colonel Farrow acquired adversary titles after the judgments of eviction had been obtained under them against him, or against him and his uncle, but no actual eviction, and afterwards continued to treat and hold the land to which such titles had been obtained, as he had done before, and as he held the other lands of his uncle, as his agent, the titles thus acquired by him would of themselves oppose no obstacle to the plaintiff's recovery in this action, notwithstanding he had taken the conveyances in his

own name. But if, after the acquisition of such titles he had claimed to hold the land under them in his own right, and not under the title of his uncle, such titles, we think, might be relied upon in bar of the plaintiff's action, as to so much of the land in controversy as might be embraced by them, and for that purpose the evidences of such titles would be competent testimony. If such titles were acquired by Colonel Farrow, in whole or in part by his uncle's funds or means, that fact would have a tendency to rebut any mere presumption as to his subsequently holding such lands in his own right.

In view of the principles which we thus recognize as applicable to this case, we are of opinion that the instructions of the court below are not such a full and unambiguous exposition of the law as secured to the plaintiffs a fair trial before the jury. Some of them, although they may be true in themselves, are evidently misleading in their tendency, and not applicable to any point upon which the controversy turns. Others are not warranted upon the principles recognized in this opinion.

Wherefore the judgment is reversed, and the cause remanded, that a new trial may be had upon principles not inconsistent with this opinion.

TENANT, ADVERSE POSSESSION BY: See *Bates v. Austin*, 12 Am. Dec. 395, and note; *Jackson v. Davis*, 15 Id. 451, and note, in which this subject is fully considered; *Camp v. Camp*, 13 Id. 60; *Doak v. Donelson*, 24 Id. 485; *Duke v. Harper*, 27 Id. 462.

TENANT, WHEN NOT ESTOPPED FROM DISPUTING LANDLORD'S TITLE: See *Hall v. Benner*, 21 Am. Dec. 394, note 404.

READ v. MARSH.

[5 B. MONROE, 8.]

ACCEPTANCE OF A BILL OF EXCHANGE MAY BE MADE BY LETTER, whether written before or after such bill is drawn, although the holder was not induced by such letter to take the bill.

ASSUMPSIT. The opinion states the facts.

Guthrie, for the plaintiff.

Loughborough, for the defendant.

By Court, BRECK, J. This was a petition and summons brought by the defendant against the plaintiffs in error, upon a bill of exchange. The facts as presented on the trial are these: On the first of March, 1842, William Alexander drew a bill of

exchange, payable to his own order, six months after date, at the Louisville office of the Northern Bank of Kentucky, on Thomas J. Read & Son, at Louisville, for one hundred and ninety dollars. At the date of the bill, or shortly after, Alexander indorsed and passed it to B. B. Marsh, the defendant in error, to enable him to raise that much money due him from Alexander. In April following, the bill was presented to Read & Son for acceptance, which they refused. In June Read & Son wrote to Alexander, and among other things say in their letter: "Your drafts to Captain Lear for seven hundred dollars and one hundred and ninety dollars, shall be protected, and as fast as you send off B. and R. we will aid you by other acceptances; and as soon as you get through delivering the B. and R. (bagging and rope) for the one thousand three hundred dollars acceptance and the one thousand dollars on the two thousand dollar note, we are ready to send you another acceptance for one thousand four hundred dollars, on account of ——." A desire is, also, expressed in the letter, to have the selling of all the bagging and rope made by Alexander. The letter concludes by saying: "We hope yet to do well, notwithstanding the lies and slanders propagated against us, that we have stopped payment." Marsh was, shortly after the date of this letter, apprised of its contents, and was advised and determined, upon the faith of it, to hold on to the bill and forward it to Louisville for collection. The bill, at maturity, was presented to Read & Son and regularly protested for non-payment. Alexander was a manufacturer of rope and bagging in the county of Bourbon, where Marsh also resided. Read & Son resided in Louisville. It appears, from the testimony of Captain Lear, that he held a bill for seven hundred dollars, drawn by Alexander upon Read & Son, which was the only bill he ever held upon them, drawn by Alexander.

Alexander proved that the bill in contest was the same bill referred to in the letter of Read & Son, and that he had drawn none of that kind in favor of Lear; that he was in the habit of sending them large quantities of rope and bagging, and that they would accept his drafts when they had in hand funds to render them safe; that he was embarrassed in his pecuniary affairs, and unable to pay his debts, which was known to both the plaintiffs and defendants; that since he drew the draft in question, he had forwarded the defendants rope and bagging to a large amount, but none to meet said draft. It further appeared, from the testimony of the cashier of the bank in Paris, that Alexander

presented the letter of Read & Son in bank, where its contents were made known to Marsh, for the purpose of sustaining his own and their credit, and that he exhibited the letter as referring to the draft, in favor of Captain Lear for seven hundred dollars, and to the one in favor of Marsh for one hundred and ninety dollars.

Such being the testimony, the court, on motion of the plaintiff, instructed the jury: "That if they believed the bill sued on was the bill for one hundred and ninety dollars, in the defendants' letter referred to, that the letter of the defendants was an acceptance of said bill." A verdict was found for the plaintiff and judgment thereon, to reverse which the defendants prosecute this writ of error. Whether the court correctly instructed the jury, is the main question for consideration. The effect or import of the instruction is, that the jury should find for the plaintiff, provided they believed the bill sued on to be the bill referred to in defendants' letter to Alexander. We regard the testimony as to the identity of the bill as entirely satisfactory and conclusive, and of course that the verdict was right under the instruction. Was the court right in assuming that the letter was an acceptance, if the bill sued on was the one referred to in the letter? It seems to be now well settled, that a letter, promising to accept or protect a bill, whether written before or after it is drawn, may operate as an acceptance, and that it may so operate, although the holder has not been induced by such letter or promise, to take the bill: *Wynne v. Raikes*, 5 East, 514; Chit. on Bills, 177, and the authorities there referred to. The promise to protect the bill, in this case, is unqualified and express, and the whole letter of a character well calculated to give credit to the bill, and to induce persons to take it upon the faith of the promise to protect it. It is true the plaintiff was, at the date of the letter, the holder of the bill, but upon being advised of the contents of the letter, although the defendants had previously refused to accept it, he retains it and again forwards it for collection. We are, therefore, of opinion that the letter was a virtual acceptance of the bills therein referred to, and binding upon the defendants. But it is insisted that the bill in this case, is not one of the bills which the letter promises to protect. The letter says: "Your drafts to Captain Lear for seven hundred dollars, and one hundred and ninety dollars, shall be protected." Captain Lear holds a draft for seven hundred dollars, and the plaintiff holds one for one hundred and ninety dollars. The defendants were apprised of the draft for

one hundred and ninety dollars. It had previously been presented to them; no other draft of the description had been drawn upon them by Alexander. Had the expression in the letter been, your drafts to Captain Lear for seven hundred dollars, and to ——— for one hundred and ninety dollars, shall be protected, no doubt could exist that the promise would extend to a draft to the plaintiff for one hundred and ninety dollars. So a letter promising to accept a bill for a given amount, before the bill was drawn, would be an acceptance to the subsequent holder, although not named in the letter.

We are not only satisfied that the bill in this case is the one referred to in the letter, but that the testimony adduced to establish its identity, was competent, and consequently that there was no error in the instruction to the jury, and that the judgment ought not to be disturbed. We have deemed it unnecessary to notice particularly the motion for a nonsuit, as the court, if right in the instruction to the jury, was unquestionably right in overruling that motion.

Wherefore, the judgment is affirmed.

WRITTEN PROMISE TO ACCEPT A BILL OF EXCHANGE not yet in use will amount to an acceptance if the bill is taken on the faith of such promise. Verbal promise to accept will not have such effect: *Kennedy v. Geddes*, 33 Am. Dec. 289. See also this subject discussed at length and the authorities collected in note to *Coolidge v. Payson*, Redf. & B. Lead. Cas. 43, in which the authority of the principal case is doubted. In *Jones v. State Bank*, 34 Ill. 313, it was held that a promise to any person interested in having a bill paid, inures to the benefit of the holder. In *Exchange Bank v. Rice*, 98 Mass. 293, the principal case was referred to as the only American case which upheld the doctrine that the holder of a bill could maintain an action on a promise to accept, made not to him, and after he took the bill, and the court in that case refused to adopt such rule.

HACKLEY'S EX'RS v. SWIGERT.

[5 B. MONROE, 86.]

PROPERTY IN THE CUSTODY OF THE LAW CAN NOT BE LEVIED ON, seized, or sold under an execution. Purchaser of such property is a purchaser *pendente lite*.

PURCHASER UNDER AN EXECUTION OF PROPERTY IN LITIGATION, who is compelled to surrender such property by order of the court, may maintain *assumpsit* for the purchase price against the plaintiff in execution, or the defendant who directed the levy, and in satisfaction of whose debt such purchase price was applied.

WHETHER A STRANGER, WHOSE PROPERTY HAS BEEN SOLD under an execution, can maintain *assumpsit* against the defendant whose debt has been paid thereby, *quære*.

ASSUMPSIT. The opinion states the facts.

Kavanaugh, for the plaintiffs.

Cates, Lindsey, Morehead, and Reed, for the defendant.

By Court, EWING, C. J. An attachment was sued out on a bill filed by Lillard against James S. Hackley, as a fraudulent debtor, and levied on a slave by the name of Jourden, and some other estate. The suit was afterwards consolidated with other bills and cross bills filed by other creditors. After the levy of the attachment, and execution issued on a judgment in favor of Major, for one thousand dollars, against James S. Hackley and John Hackley, and by the direction of John, was levied on the boy Jourden. Before the sale John died, and his executors, the plaintiffs in error, by written instructions, directed the sheriff to proceed with the sale. He did proceed, and sold the boy, and Swigert, the defendant in error, purchased at three hundred and seventy dollars, and paid the price to the sheriff, which was credited on the execution of Major. The suit of Lillard, consolidated with others, went on, and a decree was rendered for the sale of the boy and other property attached and in litigation, and all persons in possession directed to surrender the property to a commissioner for sale. The whole of the other property was sold, but Swigert refusing to surrender the boy Jourden, a rule was served on him to show cause why an attachment should not issue against him. Upon the return of the rule, Swigert appeared and showed for cause the facts stated above, and resisted the rule. The court overruled his objections and ordered a surrender absolutely. The boy, under the order of the court, was given up to the commissioner and sold, and the money applied in part to the satisfaction of Lillard's demands, and in part in satisfaction of the decree in favor of other creditors whose suits had been consolidated with Lillard's. Swigert immediately brought suit in detinue against Draffin, the purchaser of the boy under the commissioner's sale, and notified the executors of the suit, and of his desire that they should appear and assist in its prosecution, and of his intention to hold them, as executors, responsible in the event of his failure. The trial in detinue was had on the merits, and Swigert defeated. He then instituted this suit in *assumpsit*, in which are several counts, one on *indebitatus assumpsit*, one on an implied warranty title, and others setting out the special facts of the case, and concluding in *assumpsit*. Upon the trial, a verdict was found for Swigert, and judgment rendered thereon for three hundred and seventy dollars,

the amount he paid on the execution of Major, and Hackley's executors have brought the case to this court.

The slave Jourden, when attached, was in the custody of the law, and under the entire control of the chancellor, and could not be levied on, seized, or sold, under the execution, as was intimated by this court in the case of *Oldham v. Scrivener*, 3 B. Mon. 579. The levy, seizure, and sale was, therefore, wholly illegal, irregular, and unauthorized, and the fact that John Hackley directed the levy, can not give validity to the levy or sale; besides, he had no title to the slaves or any color of title against the claims of creditors, prior or subsequent, and Swigert, by his purchase, derived no title from him. The title was in James S. Hackley, who was a party to the chancery proceeding, and was concluded by it. Swigert, who was no party to the suit, had, by the wrongful act and order of John, become an intermeddler with a slave that was in the custody and under the control of the chancellor, in a proceeding to subject it to the payment of James' debts, whose property to that end it was. He was, therefore, guilty of contempt to the authority of the court, in taking possession of and setting up claim to the boy, and refusing to surrender him to the order of the chancellor, and the levy and sale, which were illegal, afforded no justification. And John Hackley and his executors, were all guilty of contempt, in causing the boy to be levied on and sold. It may, therefore, be well questioned, whether Swigert, so soon as he was advised of the condition of the boy, might not have abandoned his purchase, restored the boy to the custody of the law, from whence he was induced to take him by the wrongful intermeddling of John Hackley, and his executors, and sued for his money paid in satisfaction of so much of the judgment against John.

Be this as it may, we feel perfectly satisfied, that he might do so after he had been compelled to surrender him under a rule of court, and failed in an action of detinue, to recover him, the executors having notice of the pendency of the action. And the more especially, when it appears that the surrender and sale was necessary to satisfy a balance of even Lillard's decree, under whose attachment he was seized. Besides, Swigert was a *pendente lite* purchaser, the boy was in litigation as James S. Hackley's property, who was a party, and subject to the payment of his debts, and a decree had been rendered subjecting him at a prior term, and was final and conclusive, as well upon James as upon Swigert, who had acquired him *lis pendens*, and the court could not, nor should it, if it could, have gone behind its former

decree to relieve Swigert or John Hackley, who were intermediate intermeddlers with the boy, any more than James, who was a party. They, as *pendente lite* purchasers, were as much bound by the decree as he.

It was settled by this court, in the case of *Sanders v. Hamilton*, 3 Dana, 552, that *indebitatus assumpsit* would lie to recover back money from the plaintiff in the execution, advanced in the purchase of property under execution, which he, the plaintiff, had been instrumental in causing to be levied on and sold, though such recovery might have the effect to drive him to his motion to quash the return, that he might be restored to his remedy on his execution for the amount so indorsed as a credit. If so, much more may he maintain this remedy against a defendant who has directed the levy, and been instrumental in the sale, to whose use, and in the satisfaction of the execution against whom the money has been applied, and whose attitude under the execution has been in no wise changed by it. Indeed, it may be a matter of some question, whether in such a case, the action ought not to lie in favor of an innocent purchaser, against a defendant whose debt has been paid by the sale of the property of a stranger, or property not subject to the execution, without such interference.

This has often been said to be an equitable action, in which when money has been paid, which *ex æquo et bono*, should be refunded, it may be recovered back. And we perceive no good reason why it should be deemed necessary to resort to a court of equity, for the purpose of recovering money from a defendant in an execution, whose debt has been paid by the sale of a stranger's property, or property not subject to the levy. It is true the money has not been paid by the purchaser for his use, directly at his request, yet it has been paid under the coercive action of the law, brought about indirectly by his failure to pay his own debt, or to surrender property to pay it. In good conscience he should refund it, and as this is an equitable action, we can perceive no good reason why remedy may not be afforded in it as well as in a court of equity; especially as no steps are necessary to be taken, which require the extraordinary power of a chancellor to change or modify the return upon the execution. But if the action will not lie, when the defendant is passive, we can not doubt that it may be maintained, and is the proper remedy, whenever he has interfered and been instrumental in causing the levy and sale.

We perceive nothing in the instructions of the court, nor in

his refusal to give the instructions asked, prejudicial to the plaintiffs in error, nor in the action of the court, in admitting evidence, nor in any opinion expressed in the progress of the case. The judgment is therefore affirmed with costs.

UNDERWOOD v. NEWPORT LYCEUM.

[6 B. MONROE, 129.]

ASSUMPSIT FOR WORK AND LABOR ON ACCOUNT OF ENGRAVING bank bills will lie against a corporation although such corporation is prohibited by law from engaging in the business of banking.

TRESPASS MAY BE COMMITTED BY A CORPORATION, if by its managers or authorized agents it commands the trespass, or sanctions it when committed.

ASSUMPSIT. The opinion states the facts.

Harlan and Craddock, for the plaintiffs.

Oates and Lindsey, for the defendants.

By Court, EWING, C. J. This is an action of *assumpsit* brought by the plaintiffs in error, against the president and directors of the Newport Lyceum, to recover the amount of their account for engraving bank bills for said institution, and for the steel plate made for engraving the same. The defendants pleaded *non assumpsit*, and demurred to the declaration, which was overruled, a trial had on the plea, and a verdict for the plaintiff for one thousand dollars. This verdict was set aside and a second trial had, in which a verdict was found for the defendants, a motion for a new trial overruled, and the case brought to this court for revision. Two questions arise on this record: 1. Is the *assumpsit*, if made, binding on the corporation? 2. Is the proof sufficient to sustain the *assumpsit*?

1. The act incorporating the Newport Lyceum, though it confers very broad and general powers, does not confer upon the company the power of banking or invest them with the power or privilege of emitting or putting in circulation notes, bills, or checks, "of the character and currency of bank-notes," nor to exercise any of the powers or privileges of banking, and these powers not having been especially conferred by their charter, the incorporated company are not only subject to the restrictive provisions of the act of 1834, 1 Stat. L. 225, which expressly inhibits the exercise of any of those powers, but by their exercise, the officers, agents, and servants of the company would fall under the penal denunciations of the act of 1812: 1 Stat. L. 231. But though the corporation is prohibited from issuing bills,

notes, or checks as currency, or exercising any of the powers of banking, there is no special prohibition to be found in their charter, nor in any of the provisions of the acts referred to, or any other, restraining them from purchasing bills, checks, or notes, or from engaging the services of any one to engrave the same for them. And though it should be presumed that their object was to use those bills illegally, and in the illegal exercise of banking powers, we are not prepared to concede that their *assumpsit* to the plaintiffs for their labor, services, and expenses in making the steel plate and engraving them, would not be valid and enforceable against the corporation.

A corporation, as is well established by the authorities, may be made responsible in an action on the case for a tort, and even in an action of trespass, if by its managers and authorized agents, it commands the trespass to be committed, or sanctions and approves the act when committed: 1 Chit. 87. If, therefore, as a corporate body it may be made responsible for perpetrating a wrong to the injury of others, the power to do which their charter can never be presumed to confer, much more may a corporation be rendered responsible in damages for a breach of their *assumpsit* to strangers who may be presumed to be ignorant of their powers, by which they engaged their services, and induced them to expend their labor, time, and means, at their instance, and for their benefit. Nor can it matter whether the bills furnished, or the proceeds of the labor expended at their instance, was of value to the company, or could be used or converted by them to profitable purposes or not. Of that the managers of the institution were to judge, and not the persons employed to do the work. The work, labor, and expenses of the employed is their consideration for the *assumpsit*, and is sufficient to sustain their action, whether the corporation judged rightly or not in engaging them, or could not convert the proceeds of their labor to a profitable account.

2. We are also satisfied that the proof was sufficient to sustain the *assumpsit*, and it was the duty of the jury to find for the plaintiffs some amount in damages. The services rendered were recognized by a person styling himself cashier of the company; a large parcel of the bills came to the business house of the corporation, and many of them were filled up and signed by the president and cashier, and some of them issued by the authority of the company. We must presume, from the evidence in the case, that the president and managers of the corporation authorized the employment of the plaintiffs to render the services. or

sanctioned and approved the same when rendered, received the bills, and appropriated a portion of them to the use of the company.

The precise amount or value of the bills is not shown; but it is obvious from the proof, that a large quantity were received, and it is equally obvious that the services and expenses of engraving them were of some value. The jury were, therefore, not authorized to find a verdict for the defendants, but were bound, by the proof, to find something for the plaintiffs.

The judgment of the circuit court is, therefore, reversed, and cause remanded that a new trial may be awarded upon the payment of costs; and the plaintiffs in error are entitled to their costs in this court.

CORPORATION'S LIABILITY FOR TORTS: See *Riddle v. Proprietors*, 5 Am. Dec. 35, and note; *Chestnut Hill T. Co. v. Rutter*, 8 Id. 675; *Orr v. Bank of United States*, 13 Id. 588, and note; *Lyman v. White River Bridge Co.*, 16 Id. 705; *Whiteman v. Wilmington etc. R. R. Co.*, 33 Id. 411.

HALLEY v. OLDHAM.

[5 B. MONROE, 233.]

PURCHASER OF LAND AT AN EXECUTION SALE, WITH NOTICE of a prior equitable estate in such land, takes subject to such equity.

PURCHASER, WITH NOTICE AT ANY TIME before he is clothed with the legal title of an outstanding equity, is bound by such prior equity.

SALE AND CONVEYANCE UNDER AN EXECUTION relate back to the time the execution was placed in the officer's hand, so as to defeat a subsequent conveyance of the legal title, even to the holder of a prior equity.

BONA FIDE PURCHASER, WITHOUT NOTICE, AT AN EXECUTION SALE, before he receives a sheriff's deed, is not the holder of a merely equitable estate, but of an inchoate legal title, and is not affected by notice subsequently acquired of a prior equity.

CHANCERY. The opinion states the facts.

Turner and Goodloe, for the plaintiffs.

Caperton, for the defendants.

By Court, MARSHALL, J. This case presents, for the first time in this court, the direct question whether a purchaser of land under an execution sale, who has purchased when neither he nor the creditor had notice of a prior executory contract between the debtor and another, for the sale of the same land, is to lose his purchase by having notice before he has received a deed from the sheriff, but after he has either paid the money or executed

such bond for it, as having by law the force of a judgment, extinguishes the original debt and gives to the creditor a direct remedy, by execution, against him and his surety.

In the case of *Helm v. Logan's Heirs*, 4 Bibb, 78, it was decided that the purchaser of a slave under execution, was not affected by notice even before his purchase, of a mortgage of the same slave, which being unrecorded, was deemed void as to creditors, and therefore, as to the purchase under the creditor's execution. The case of *Graham v. Samuel*, 1 Dana, 166, sustains, virtually, the same principle as applicable to a sale of land under execution. But the case of *Campbell v. Moseby*, Litt. Sel. Cas. 358, decided before that of *Graham v. Samuel*, and the case of *Chinn v. Butts*, 3 Dana, 547, and that of *Morton v. Robards*, 4 Id. 258, decided since, establish the principle that if the execution purchaser have notice before his purchase, the title subsequently acquired by him is held in equity, subject to the claim of the prior incumbrancer. In the cases of *Campbell v. Moseby* and *Morton v. Robards*, the execution purchaser seems to be treated, in the reasoning of the court, as an ordinary purchaser, liable to be affected by notice, at any time before he actually receives a deed conveying the title. But in this respect the argument goes beyond the facts of the case, and is, therefore, not to be regarded as a judicial decision of the question. And in the case of *Morton v. Robards*, the court expressly waives a decision of the question, whether the legal title, when completed, may not relate back to the commencement of the lien under the execution, so as to overreach the prior equity, and protect the creditor who had no notice of it at the time of its commencement.

These discrepancies have arisen in giving effect to the statutes subjecting land to the payment of debts, and to the declaration of our statutes of conveyancing, that no estate in land, for a longer term than five years, shall pass, except by deed, and that such deed shall not be good against a purchaser without notice, nor any creditor, unless proved or acknowledged and recorded, as required by law. The two cases just noticed, decide, in effect, that the distinction made in favor of the creditor, on the subject of notice, however it may operate with regard to the transfer of the legal estate, is entitled to no weight in determining between the equities which will control and bind that estate; and that although the statutes seem to say, in favor of the creditor, that the legal estate remains in the debtor, and may be subjected to the satisfaction of the creditor's demand, though there be an unrecorded deed of which he has notice, transfer-

ring the title to another, yet a court of equity, considering that by notice of such unrecorded deed, or even of a bond for a deed, the conscience of the purchaser is affected, and undertaking to correct his unconscientious proceeding, will deprive him of the fruits of his purchase, and coerce a conveyance which shall transfer the legal estate in obedience to the equity evidenced by the bond or unrecorded deed. If the creditor is himself the unconscientious purchaser, he of course loses by the operation of this principle, the satisfaction of his demand, which he had apparently obtained by subjecting under the sanction of the statute, the legal estate to sale under his execution. But suppose the creditor remaining wholly ignorant of the prior equity, has received his debt from a purchaser who had notice at the time of his purchase, or, which is a stronger case, from one who, without having had notice at the time of the purchase, or even at the time of his paying the purchase money, has it before he receives a deed, how is the chancellor, under these circumstances, to dispose of the case? Is the creditor, who has acted throughout with good faith, to be deprived of his money, or other satisfaction, and remitted to his remedy by execution against an insolvent, on account of the bad faith of the purchaser in the first case, or on account of notice communicated to the purchaser in the other cases, after he has satisfied the judgment by payment or by a statutory bond?

Could the purchaser, in either of the supposed cases, either recover the purchase money back from the creditor, or enjoin him from coercing the bond? And if in the first case, he may, on the ground of bad faith in entering upon the purchase, be compelled to relinquish it and look to the original debtor for his indemnity, can he be equitably subjected to these conditions, which may involve an absolute loss of what he has paid, or is bound to pay, because, although he has come in aid of the legal remedy for the coercion of the debt with a good conscience, and discharged or assumed the responsibilities of a purchaser by paying the purchase money, or becoming bound for it as required by law, he is informed or accidentally learns before he receives a conveyance, that there was a secret equity affecting the land, in the hands of the debtor, before he became thus involved in the character of a purchaser? It is surely worthy of some consideration, that a sale under execution is not like an ordinary sale, a private transaction, brought about and regulated by the will of the parties; but is a public transaction, appointed and regulated by law, as a means of enforcing a judg-

ment, and of which the terms and consequences are fixed by statute. And when, by the act of the public officer, under legal process, land apparently subject to the execution, is thus offered for sale, after levy and advertisement, may not the persons who, in accordance with the policy of the law, are brought together to bid for the land, and to satisfy the judgment by buying it, place some confidence in these circumstances as constituting a protection against secret and hidden claims, which they have no means of discovering? Is not the holder of such a claim under some obligation not to permit innocent persons to be implicated in the difficulty which a want of notice may produce? And is he not to be affected by the publicity of the whole proceeding, from the commencement of the suit, and by the sanction which the law gives to it? In fine, may he, while such proceedings are going on, and innocent persons are becoming involved, repose in silence and security upon an executory contract, whether he has yet paid anything on it or not, with the privilege of relying upon the effect of a subsequent notice to the execution purchaser as giving him the right of completing his own contract at pleasure, and coercing a conveyance to himself, because, before the purchaser had, in pursuance of the terms of sale, paid the purchase or received a deed, he became apprised of the pre-existing contract?

It is not necessary, in the present case, to answer these inquiries, which, however, seem to concur in indicating the equitable conclusion to be, that where the creditor has acted throughout in good faith, and the purchaser has, without any knowledge of a prior equity, paid the money or become bound to do so, according to the lawful conditions of the sale, his right as a purchaser should not be affected by subsequent notice. It may be that a purchaser coming in with a knowledge of the prior equity, should not, on account of his personal bad faith, be protected by the right or equity of the innocent creditor, but should be subject to any loss which may follow from his own unconscientious act. But it can hardly be deemed unconscientious for one who has become fixed as a purchaser, while he had no notice, to go on, after he has received notice, either to obtain a deed from the sheriff, if he has already paid the money, or to make payment and obtain the deed, if he has not paid before notice. The sale itself being fair and valid, it is the policy of the law that it should have its full effect, not only satisfying the judgment, but also in securing to the purchaser the fruits

of his purchase; and a court of equity should not interfere to frustrate this policy, but upon the clearest grounds.

It is true, that in case of ordinary purchases, a second purchaser is held bound by the prior equity, though he may have made his contract and fully paid the purchase before he has notice of it, provided he has such notice before his own equity is clothed with the legal title. But passing by the obvious consideration, that in case of private purchases the second contract is commonly as secret as the first, and there is therefore no particular call, or occasion for the first purchaser to make his claim known; it seems to us that the application to cases of execution sales, of the doctrine just referred to, would tend to produce confusion and uncertainty in titles derived under such sales, would diminish confidence in them with the general consequence of sacrificing the property sold, and would impair seriously the efficacy of the remedy which the law intends to give to the creditor, by execution against the land of his debtor.

The statute of 1792, subjecting land to the payment of debts (1 Littell's Laws, 120), declares that every writ of *fiери facias* shall bind the property of the lands, tenements, and hereditaments (of the debtor), from the time it shall be delivered to the officer. In obedience to this declaration, and as being necessary to give effect to the lien which it secures to the execution, it has been uniformly held that the subsequent levy, sale, and conveyance of the land, relate back so as to overreach any conveyance made by the debtor after the execution came to the officer's hands, though made to the holder of the prior equity: *Million v. Riley*, 1 Dana, 359 [25 Am. Dec. 149]; *Butts v. Chinn*, 4 J. J. Marsh. 641; *Chinn v. Butts*, 3 Dana, 547; *Addison v. Crow et al.*, 5 Id. 271. The cases of *Million v. Riley* and *Butts v. Chinn* were questions by the execution purchaser in each case against the holder of the prior equity, who had obtained the prior deed from the debtor, dated in the first case before the levy of the execution, but after it came to the officer's hands, and in the second case, after the levy. In the first case, it was virtually decided, that by the effect of this relation, the execution purchaser, though his deed was the youngest, had the elder legal title. And in the other case, the court expressly said, "the deed of the appellant is prior in date to that of the appellee; but the latter took effect, and vested the legal title, by relation, from the date of the levy." The inadvertent reference in this case, to the date of the levy, instead of the delivery of the execution, as the time at which

the title vested, by relation, is corrected when the case came up in equity between the same parties, *Chinn v. Butts*, 3 Dana, 547, and the cases must be regarded as concurring on this point.

The effect of this doctrine is, that in case of a levy, sale, and conveyance, these acts connect themselves with the delivery of the execution to the officer, so as to form one single transaction, which, so far as regards the passage of the title from the defendant, takes date from the first act which gives the lien. And it seems to us to be an allowable, and therefore in view of the inconveniences which have been adverted to, a proper consequence, that the purchaser who with a clear conscience, acquires an interest, and identifies himself with the transaction, by being received as purchaser, and satisfying the judgment, which is the great object of the whole proceeding, and especially of the lien, is entitled to the full benefit of the relation which carries back his title, when consummated, to the commencement of the lien. And that when the transaction is regularly closed by the sheriff's deed, his title takes that date in a court of equity, as well as in a court of law. And as we do not admit that the interest which he acquires as purchaser, before obtaining a deed is a mere equity, for a mere equity would not carry back the title by relation, in a court of law, so we do not admit, that while he has that interest only, the chancellor can treat him as the mere holder of the junior equity, subject as such, to be affected by notice of a prior equity. We are disposed to regard him as having by his purchase, not only an equity, but an inchoate legal title. He has the full benefit of a lien which binds the land at law, if perfected by a conveyance from the sheriff, and having accomplished the object of the law and of the execution, in satisfying the judgment, he can not afterwards be disturbed in his legal rights by notice of a prior equity. It is said that the law subjecting land to the payment of debts, authorizes a conveyance only of such title as the debtor has, and may lawfully part with, and that having previously parted with the equity, it can not pass to the purchaser. But the statute authorizes a conveyance of all the estate and interest which the debtor has and may lawfully part with. If the legal title be in him, it is subjected to sale and conveyance; and in this case, as in that of a private sale, the legal title is all the grantee wants in order to secure the plenary beneficial enjoyment of the estate, unless he takes it under circumstances which subject him to an outstanding equity. In view of the statute, the land belongs to the person holding the legal title, and is subject to the payment

of his debts. It is not the statute, but the court of equity, which withdraws it from this subjection, to answer to a prior equity. And we decide that such prior equity, if kept secret until after the execution sale is complete in its principal objects of paying or securing the judgment, can not be then brought forward with the effect of intercepting the purchaser's title, or wresting it from him. The statute says the sheriffs shall convey, etc., and the deed shall be effectual to pass to the purchaser all the estate and interest which the debtor had (that is, at the time of the sale), and might lawfully part with. It thus fixes the rights of the purchaser as they existed at the time of the sale, and the mere discovery that there had been a prior equity, can not preclude him from going on to consummate them.

Wherefore, without referring to any special circumstances which might affect the equity relied on by the complainant, the decree, dismissing the bill, is affirmed.

BRECK, J., did not sit.

TO CONSTITUTE ONE A BONA FIDE PURCHASER, so as to be accorded priority over the holder of a prior equity, it is necessary, not only that the consideration should have been paid, but the conveyance of the legal title should have been received before notice of such prior equity: *Jewett v. Palmer*, 11 Am. Dec. 401; *Blight's Heirs v. Banks*, 17 Id. 136; *Jackson v. McChesney*, Id. 521, and note; *Nantz v. McPherson*, 18 Id. 216; *Dowell v. Buchanan*, 23 Id. 280; *Grimstone v. Carter*, 24 Id. 230; *Union Canal Co. v. Young*, 30 Id. 212. See also Pom. Eq. Jur., sec. 755 *et seq.*, where the various doctrines on this subject are examined at length.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA

SHEPHERD v. NEW ORLEANS.

[6 ROBINSON, 349.]

MUNICIPAL AUTHORITIES ARE NOT EMPOWERED TO ALLOW any erection on the streets or banks of the Mississippi river, which will obstruct the free use of such places by the public.

PERMISSION GIVEN BY THE CITY COUNCIL TO ERECT BUILDINGS on its streets, or on the banks of the river, incommodious to the public, does not prevent a subsequent council from removing such obstructions.

NO ONE HAS THE RIGHT TO THE PERMANENT OCCUPANCY of the banks of the Mississippi, in the city of New Orleans, but the city council may erect wharves thereon at such places as commerce may require.

APPEAL from the parish court of New Orleans.

Preston and Roselius, for the appellants.

Canon and Masureau, for the defendants.

By Court, MARTIN, J. The plaintiffs are appellants from a judgment which refuses them damages for an injury, which they contend they have sustained, in consequence of the corporation having caused wharves and other works to be erected on the bank of the Mississippi, opposite to their lots, on which they had constructed, at great expense, valuable saw-mills, from which they derived great profit, by the erection of which works, they have been disabled from availing themselves of their mills, which they had put up with the consent and permission of the municipal authorities.

The mills having been built on lots of the plaintiffs, fronting on the river, but separated from it by a street, no consent or permission was needed or given by the municipal officers, for their erection; but the city council permitted certain works to be made across the street, and the bank of the river, to the

water, to facilitate the bringing of timber to the mills. The street and the banks of the river are "*loci publici*"—out of commerce, and the municipal authorities are bound to see that the use of them by the public be not obstructed; but they have no power to allow any erection thereon which may render their use incommodious. They may, indeed, temporarily tolerate works thereon, which they may deem not injurious to the rights of the public; but no permission of a council can prevent a subsequent council from putting an end to such toleration.

The plaintiffs do not complain of the positive destruction of any part of their property, but only of the exercise of the right by the municipality, or rather of its compliance with its duty, to facilitate commerce, by the erection of new wharves in parts of the port where the extension of business in its opinion, demanded them. The plaintiffs' and appellants' counsel has urged, that his clients have, in common with every inhabitant or stranger, the free use of the banks of the Mississippi, and that the municipality can not prevent any person from using these banks. While they exercise a right which they have in common with others, no one can impede or obstruct their use of the banks while there is, close by the part which they occupy, a sufficient space left for others. The counsel have told us, that a part of the bank in the use of which the defendants have disturbed them, does not extend above sixty feet, the one half of the front of the lots on which they have erected their mills. No one has a right to a permanent occupancy of the banks of a river. The planter may land his crop thereon, but he must remove it. He can not leave it there until he has found a purchaser. The fisherman may, with a few boards, erect a temporary hut, in which he may shelter himself during the storm; but he can not erect any permanent building. The municipal authorities employ officers whose duty it is to see that merchandise landed, or to be shipped, does not incumber the banks of the river, any longer than is strictly needed.

It appears to us, that the erection of wharves before the city of New Orleans and its suburbs, at such places as commerce may require, is a legitimate exercise of power in the council of either of the municipalities: *Trustees of Natchitoches v. Coe*, 3 Mart. (N. S.) 140.

Judgment affirmed.

MUNICIPAL AUTHORITIES OF NEW ORLEANS HAVE POWER to authorize the removal of property left on the river levees beyond a certain time at the expense of the owner: *Lanfear v. Mayor*, 23 Am. Dec. 477.

STATE v. PLAZENCIA.

[6 ROBINSON, 441.]

ATTORNEY FOR THE STATE IS THE PROPER PERSON on whom a citation of appeal from a judgment in favor of the state should be served.

FLEEING FROM JUSTICE NEITHER DESTROYS NOR IMPAIRS a party's right to appeal from a judgment against him.

SURETIES ON A RECOGNIZANCE PROVIDING FOR THE APPEARANCE of the principal at a stated term of court are not absolved from liability on such recognizance by the failure of the state's attorney to take judgment against them at the term stated therein, in the absence of the appearance of the principal.

APPEAL from the district court. The opinion states the facts.

J. C. Beatty, for the state.

Isley and Connelly, for the appellant.

By Court, **MARTIN, J.** The defendant is appellant from a judgment against him, on a recognizance for his appearance at court. The attorney for the state in the second district has prayed for the dismissal of the appeal, on the ground that the citation was not served on the proper officer, and on an averment that the defendant is not a resident of the parish of Assumption, as he states himself to be, but is a fugitive from justice, who conceals himself, and can not be apprehended, or brought to court to stand his trial on the indictment found against him. It appears to us, that the attorney for the state, who has obtained the judgment appealed from, and is the representative of the state in that district, is the officer on whom the citation should have been served. If served on the governor, or the attorney general, neither of these functionaries could do anything on the appeal, until he had communication with the district attorney. Wherever the residence of this man may be, he has a right of appeal to this court; and his being a fugitive from justice neither destroys nor impairs his right. His appeal must, therefore, be sustained.

The counsel for the appellant urges, that the principal and his surety should have been called at the court at which the first was bound to appear by his recognizance; and that no proceedings having then been had, none could be correctly had at the succeeding term, when the judgment appealed from was taken. The condition of the recognizance was, that the principal should appear at the May term after the recognizance was entered into. His appearance at that term was the only means of protecting him from the forfeiture of his recognizance. It is not pretended that he appeared. The law has made it the duty of the officer

of the state, to have the parties, bound by any recognizance, called, and to take judgment against them, if the principal be not produced; but this direction to the officer of the state does not absolve the parties to the recognizance. If they wish to resist the claim of the forfeiture to the state, they must allege and prove the appearance of the principal.

Judgment affirmed.

PRISONER'S RIGHT TO APPEAL WHILE A FUGITIVE FROM JUSTICE.—The effect of escaping from and out of the custody of the law, and remaining at large, upon a prisoner's right to appeal, or to prosecute other and further proceedings after a judgment of conviction against him, has come before the courts upon several occasions for adjudication. The result of such adjudications, while they are not entirely harmonious, has been to establish the doctrine, which in some states has been embodied in a statutory rule, that by fleeing from justice and remaining at large, a prisoner may lose his constitutional right of appeal: *Wilson v. Commonwealth*, 10 Bush, 527; *Lefevre's Case*, 20 Gratt. 716; *State v. Wright*, 32 La. Ann. 1017; *Gresham v. State*, 1 Tex. App. 468; *Brown v. State*, 5 Id. 126; *Lunsford v. State*, 10 Id. 118; *State v. Rippon*, 2 Bay, 99; *Sherman v. Commonwealth*, 14 Gratt. 677; *Anonymous*, 31 Me. 592; *People v. Redinger*, 55 Cal. 290.

Nor does the fact that the constitutions of the various states have uniformly guaranteed to persons accused of crime the right to appear and be heard by counsel, change the operation of the rule, that after indictment, the prisoner should be at all times in custody, either actual, by being confined in jail, or constructive, by being let to bail. This doctrine and the reasons upon which it is founded were well stated in *People v. Genet*, 59 N. Y. 80. In that case, the defendant had been convicted of a felony. An application was made to the trial judge to settle a bill of exceptions, which was refused on the ground that pending the application the prisoner had escaped. On an appeal from an order refusing a *mandamus* to compel the trial judge to settle such bill of exceptions, the court said: "The whole theory of criminal proceedings is based upon the idea of the defendant being in the power, and under the control of the court, in his person. While the constitution and the statute provide him with counsel, and the statutes give the right of appearance by attorney in civil cases, they are silent in respect to the representation of persons charged with felony by means of an attorney, and in regard to those charged with lesser offenses, the statutes permit them to be tried in their absence from court, only on the appearance of an attorney duly authorized for that purpose. This authority, it has been held, must be special, and distinctly authorize the proceedings: *People v. Petry*, 2 Hilt. 525; *People v. Wilkes*, 5 How. Pr. 105. Even in the absence of statutory regulations this rule has been enforced in the courts of the United States: *United States v. Mayo*, 1 Curt. 433. In criminal cases there is no equivalent to the technical appearance of defendants in civil cases, except the being in actual or constructive custody. When a person charged with felony has escaped out of custody, no order or judgment, if any should be made, can be enforced against him: and courts will not give their time to proceedings which, for their effectiveness, must depend upon the consent of the person charged with crime. The fact that, in this state, the law allows proceedings on writs of error without requiring the actual presence of the prisoner in court, does not at all conflict with the view that steps will not be allowed to be taken on his behalf,

when he is no longer in custody or on bail, but has fled from the custody of the law." Similar reasons for the rule were given by other courts in *Wilson v. Commonwealth*, 10 Bush, 527; *State v. Rippon*, 2 Bay, 99; and in *Gresham v. State*, 1 Tex. App. 468, it was further said, that by fleeing the prisoner would be presumed to have abandoned his appeal, and that such flight was a contempt of court which would warrant a dismissal of the appeal.

In *People v. Redinger*, 55 Cal. 290, decided in 1880, this subject underwent a thorough examination, and the prior cases were elaborately reviewed by the court. The rule laid down in *People v. Genet*, *supra*, and similar cases, was approved, together with the reasons upon which the same was based. In this case the defendant was convicted of murder, and appealed from an order denying him a new trial. At the time the case was called for argument, the attorney general, in behalf of the state, presented an affidavit showing that the prisoner had escaped, and moved for a dismissal of the appeal. It was urged on behalf of the prisoner that section 1253 of the penal code, which provided that "the judgment may be affirmed if the appellant fail to appear, but can be reversed only after argument, though the respondent fail to appear," and section 1255, to the effect "that the defendant need not personally appear in the appellate court," gave him the right to be heard in the appellate court, whether he was in custody or not. This position the court refused to entertain, and while it refused to dismiss the appeal at once, it made an order that the same should be dismissed by a day certain, unless prior to that time the prisoner surrendered himself. This action of the supreme court of California was expressly approved in *State v. Wright*, 32 La. Ann. 1017, where, under a similar state of facts, a similar order was made. See also, to the same effect, *Smith v. United States*, 94 U. S. 97; *Sherman v. Commonwealth*, 14 Gratt. 677. Where, however, an appeal has been heard, and a reversal of conviction ordered before the court has been advised of the prisoner's escape, such reversal will not be set aside: *Leftwich's Case*, 20 Id. 716. An act authorizing a dismissal on the ground of the prisoner's escape, is constitutional, and upon such dismissal the court loses jurisdiction of the appeal, unless the statute provides for a reinstatement: *Brown v. State*, 5 Tex. App. 126; *Lunsford v. State*, 10 Id. 118. But where such reinstatement is provided for upon the prisoner's voluntary return within three days, nothing short of a voluntary return will suffice to give the court jurisdiction, as by his capture the day after his escape: *Lunsford v. State*, *supra*.

In marked conflict with the weight of authority, as shown by the above decisions, stand the principal case and *Parsons v. State*, 22 Ala. 50. In this latter case the court said: "We do not see how that fact (of escape) can operate to prevent us from considering the questions presented upon the record, as to the legality of his conviction. The law regulating writs of error upon conviction for felony, impliedly dispenses with the attendance of the prisoner, by providing that he shall be detained in custody, to abide the judgment rendered by the appellate tribunal. He appears here by his counsel, and is tried by the record alone; and although he may have committed an offense against the law by escaping, the court has no jurisdiction to ascertain such offense. Our only duty is to determine upon the record whether the conviction has been according to the forms of law, and that duty must be discharged without any reference to the facts outside of the record."

OYON'S SUCCESSION.

[6 ROBINSON, 504.]

LAW SHOULD NEVER BE CONSTRUED SO AS TO OPERATE RETROSPECTIVELY, unless the legislature have, in express terms, so expressed their intention. ACT OF 1842, IMPOSING A TAX OF TEN PER CENT. upon the inheritance, devise, or legacy received by an alien, applies only to successions subsequent to the passage of such act.

APPEAL from the probate court. The opinion states the facts.

B. Winchester, for the appellants.

J. C. Beatty, for the state.

By Court, MORPHY, J. The petitioners, aliens and residents of the kingdom of France, have appealed from a decree of the inferior court, homologating an account rendered by the defendant, as administrator of the succession of the late Pierre François Oyon, who died in the parish of Lafourche Interior, on or about the twentieth of December, 1835. They contend, that as heirs at law of the deceased, they have been wrongfully and unjustly charged in said account with the tax of ten per cent. imposed by the law of the twenty-sixth of March, 1842, on property inherited by non-resident aliens; that this law should not be made to apply to successions opened before its promulgation; and that their rights as heirs having vested in 1835, they are not liable to the payment of this tax. We think that the judge erred in subjecting the appellants to the payment of the tax. It is a sound rule of construction, never to consider laws as applying to cases which arose previously to their passage, unless the legislature have, in express terms, declared such to be their intention. They might, indeed, have imposed a tax on all sums to be paid over to aliens not residing in the state, without reference to the opening of the successions from which they may be entitled to receive such sums; but unless that intention is clearly and unequivocally expressed, we are bound to suppose that, according to the ordinary rules of legislation, they intended to provide for the future, and not to affect in any way rights previously acquired.

The language of the law is "that each and every person not being domiciliated in this state, and not being a citizen of any state or territory in the union, who shall be entitled, whether as heir, legatee, or donee, to the whole, or any part of the succession of a person deceased, whether such person shall have died in this state or elsewhere, shall pay a tax of ten per cent. on all sums, or on the value of all property which he may actually re-

ceive from said succession, or so much thereof as is situated in this state," etc. We understand this law as referring only to aliens who may become entitled to the whole, or any part of a succession, after its promulgation. When did the petitioners become entitled to the sums they claim? Surely not in 1843, when they came forward to receive them; but in 1835, when the succession was opened by the death of their ancestor. A law imposing a similar tax was passed by the general assembly in 1828, but was repealed in 1830. The heirs of one Arnaud, who presented themselves after the passage of the repealing act to receive their inheritance, contended that, as the law imposing the tax had been repealed, they were no longer liable to pay it; but this court held, that the right of the state to the tax having accrued by the opening of the estate of Arnaud under the law of 1828, was not affected by its repeal: *Arnaud's Heirs v. His Executor*, 3 La. 336. See also, same volume, *Quessart's Heirs v. Canonge*, p. 561; Laws of 1828, p. 178. We would surely not decide otherwise under the law of 1842, if, after its repeal, aliens should come forward to claim a succession opened while it was in force. If so, we must hold that the tax is due only by such aliens as have become entitled to successions opened in this state after the promulgation of the law.

It is, therefore, ordered, that the judgment of the court of probates of the parish of Lafourche Interior, be so amended, as to reject from the defendant's account the item charging the appellants with ten per cent. on the amount accruing to them from the succession of the late Pierre François Oyon; and that it be affirmed in all other respects. The appellee to pay the costs of this appeal out of the funds of the estate.

STATUTES, WHEN SHOULD NOT BE CONSTRUED SO AS TO OPERATE RETRO-SPECTIVELY: See *Dash v. Van Kleeck*, 5 Am. Dec. 291, and note, 315; *Perkins v. Perkins*, 18 Id. 120, and note; *Garrett v. Wiggins*, 30 Id. 651; *Oriental Bank v. Freeze*, 36 Id. 701, and note, where the prior cases in this series are collected.

UNION BANK v. LEA.

[7 ROBINSON, 76.]

ACTUAL PRESENTMENT OF NOTE IS UNNECESSARY, when the notary having the note in his possession, demands payment of the drawer, and the latter answers that it will not be paid.

HOLDER OF NOTE MUST GIVE NOTICE to every one to whom he intends to resort; he need not give it to any others.

DEFENDANT SHOULD SHOW THERE WAS A NEARER POST-OFFICE than the one to which the notice was directed, in order to invalidate the notice. PARTY CAN NOT COMPLAIN OF SLIGHT ERROR in the appellate court when it would have been corrected below at his request.

ACTION against the defendants, as indorsers of a promissory note. In his protest, the notary certified "that he demanded payment of the cashier" of the bank at which it was payable, at the bank, "who answered that it could not be paid, there being no funds in bank for that purpose." The remaining facts are sufficiently stated in the opinion.

Denis, for the plaintiffs.

R. H. Chinn, for the appellant.

By Court, MARTIN, J. The defendants were sued as indorsers of a promissory note. There was a judgment in favor of Lea, and against Davidson, who has appealed. Our attention is drawn to a bill of exceptions to the admission in evidence of the *procès verbal* of the notary of the demand and protest, with the evidence of notice, on the ground that there was no second copy of the note, and that the demand and protest, with notices, are not such as were contemplated by the act of the legislature. We are unable to understand on what ground a second copy of the note was requisite; and neither the appellant, nor the counsel, has assisted us in finding it out. The demand was made at the place where the note was payable, and notice is stated in the protest to have been given to the appellant, in print and writing, by putting such notice into the post-office of the town where the protest was made, directed to him at Springfield, parish of Livingston, Louisiana. The district judge did not err in overruling the objection.

On the merits, it has been contended, that there was no presentation of the note in due time and at the proper place; that no notice was given to the payee and first indorser, and no sufficient one given to the defendant; and that there was an overcharge of interest. The note bears date the nineteenth of November, 1840, and was payable twelve months after, or on the nineteenth of November, 1841. The third day of grace was the twenty-second, and the protest was made on that day, and at the place at which, on its face, the note was payable. It is urged, that it in no way appears that the notary presented the note to the cashier. When the notary of a bank receives a note to be protested, he goes to the drawer and demands payment; if he is answered that it will not be paid, he does not take it

out of his pocket-book or out of the bundle which contains it, to present it, for that would be a vain ceremony. *Lex neminem cogit ad vana*. The cashier having said that there were no funds to pay the note, no presentation was necessary. The holder of a note must give notice to every one to whom he intends to resort. He need not give it to any other. If the first indorser was not notified by the bank, it lost its recourse on him. If the second indorser, the present appellant, wished to recur to him as his own indorser, it was his duty to give notice. The bank was not bound to do it for him. The petition describes the appellant as a resident of the parish of Livingston. The answer does not deny this. The notice was directed to him at Springfield, which is the place where the courts of the parish are holden, and where there is a post-office. If there was another office within the parish or elsewhere, nearer to his residence, he should have shown it.

To the overcharge of interest, the principle of the common law, *de minimis non curat lex*, or that of the Spanish law, *lo poco por nada se reputa*, is applicable. The fractions of a day are not noticed by law. The banks do not pay the proceeds of discounted notes, until the afternoon of the discount day, yet they charge the interest for the fore part of the day, as well as for the latter part, during which only the person who obtains the discount possesses the money; yet no one would imagine that they are thereby chargeable with usury. This was a *lapsus calami* in the judgment, which would have been corrected below, had it been asked for; and the defendant can not be allowed, by delaying to complain till the case is brought to this court, to mulct the plaintiff in the costs of the appeal, especially as the counsel of the bank is willing that the error shall be at any time corrected, and it does not exceed thirty cents.

Judgment affirmed.

HOLDER OF NOTE IS BOUND TO NOTIFY ALL PRIOR PARTIES to whom he intends to resort, of demand and non-payment: *Carter v. Bradley*, 38 Am. Dec. 735.

IMMATERIAL ERRORS OCCURRING AT A TRIAL, which could not have influenced the determination of the action, are not sufficient to warrant a reversal: *Frankfort Bridge Co. v. Williams*, 35 Am. Dec. 155; though in *Irish v. Cloyes*, 30 Id. 446, it was held that a case on exceptions must be reversed for any error appearing on the record, however trivial may be the right affected.

NOTICE OF DISHONOR: See note to *Gilbert v. Dennis*, 38 Am. Dec. 329, where this subject is discussed.

MONTROSS v. DOAK.

[7 ROBINSON, 170.]

"PLACE OF PAYMENT" MEANS a place where the holder can present the note, where the maker can deposit or provide funds to meet it, and where a legal offer to pay can be made.

NAMING OF A CITY AT LARGE AS PLACE OF PAYMENT is not such an indication of the place of payment as can make it incumbent on the holder to make a demand anywhere before he can entitle himself to recover.

APPEAL from the commercial court of New Orleans. The opinion states the case.

Emerson, for the plaintiffs.

Claiborne, for the appellants.

By Court, MORPHY, J. The defendants, who reside out of the state, are sued under our attachment laws, as the makers of three promissory notes, dated and made payable at New Orleans. The defense set up is, that no demand was made at the place of payment mentioned in the notes, and that under the settled jurisprudence of this court, such a demand is a condition precedent to the right of recovery. The various decisions in our reports, to which the counsel for the appellants has referred, apply to cases where a particular and certain place of payment is specified in the body of the note. The words "place of payment" must receive a reasonable construction. They mean a house, bank, counting-room, store, or place of business, where the holder can present the note, where the maker can deposit or provide funds to meet it, and where a legal offer to pay can be made. The naming of a city at large, is not such an indication of a place of payment, as can make it incumbent on the holder to make a demand anywhere before he can entitle himself to recover, from the impossibility of knowing at what particular place or spot, within the limits of the city, such a demand should be made. *Lex neminem cogit ad vana seu impossibilia*. Were it shown that the makers had a domicile, or place of business in New Orleans, it might perhaps be contended that, under the terms used in the note, a demand should have been made at such domicile or place of business; but the defendants are non-residents, and have no place of business in the city. In relation to the liability of the drawer and indorsers of a bill drawn upon a person resident in A., but made payable in B., a large city, without specifying any particular place in B., it has been held to be sufficient for the holder either to present the bill to the drawer for payment at his place of residence, or to have the bill

at the place where it is payable on the day of payment, and there to have it protested, without making any inquiry for the drawer: Bayl. on Bills, 210; *Boot v. Franklin*, 3 Johns. 208; 3 Kent, 96. As the notes sued on, mention no particular or certain place of payment, no demand anywhere was, in our opinion, necessary to make the defendants liable.

Judgment affirmed.

NOTES PAYABLE AT PARTICULAR TIME AND PLACE: See *Washington v. Planters' Bank*, 23 Am. Dec. 333, and note, referring to other cases in this series.

VAN HERN v. TAYLOR.

[7 ROBINSON, 201.]

COMMON CARRIERS ARE RESPONSIBLE FOR LOSS or damage of things intrusted to their care, unless the same is occasioned by accidental and uncontrollable events.

"DANGERS OF THE RIVER" INCLUDE LOSS BY COLLISION, when there was no fault or carelessness on the part of the carrier, and it was out of his power to have prevented it.

APPEAL from the parish court of New Orleans. The opinion states the case.

T. A. Clarke, for the plaintiff.

Randall, for the appellants.

By Court, MORPHY, J. This is an action to recover the value of some hogsheads of tobacco, shipped on board of the steamboat *George Collier*, from divers points on the river Mississippi, and which were not delivered in New Orleans pursuant to the bill of lading. The defense set up is, that the defendants are not liable, because their boat, without their fault, or that of the persons having charge of her, was run foul of on her voyage down the Mississippi, by the steamboat *Emperor*, then going up the river, by which collision and unavoidable accident the plaintiff's tobacco was thrown overboard, and either lost or damaged, etc. There was a judgment below in favor of the plaintiff, from which the defendants have appealed.

On the trial of the case, the testimony of several witnesses was offered to show, that the plaintiff's tobacco was lost in consequence of a collision which took place between the *George Collier* and the steamboat *Emperor*, without any fault or negligence on the part of the defendants or their agents; and that the collision was an unavoidable accident, etc. This testimony,

being objected to by the plaintiff, was rejected by the inferior judge, on the ground that the collision of itself is not one of those unavoidable accidents or dangers provided for in the bill of lading. The testimony was, in our opinion, improperly excluded. A common carrier is responsible for the loss or damage of things intrusted to his care, unless the same is occasioned by accidental and uncontrollable events: Civ. Code, art. 2725. The terms of the bill of lading free the defendants from any responsibility for losses happening from unavoidable accidents and dangers of the river. Whether the collision was an accidental and uncontrollable event within the meaning of the code, or was an unavoidable accident and danger of the river, as provided for by the bill of lading, must depend entirely upon the circumstances under which it happened. If there was no fault or carelessness on the part of those who had charge of the *George Collier*, and it was out of their power to have prevented the collision, we can see no good reason why it should not be considered as an unavoidable accident, and as one of the dangers of the river, within the meaning of the bill of lading. All the writers on the law of insurance mention the running foul of other vessels as one of the perils of the sea, and hold, that the insurers must make indemnity for any loss resulting from such accidents, when not imputable to the misconduct or negligence of the master or crew of the ship insured: 1 Ph. Ins. 635, 636; 2 Marsh. 493.

In *Peters v. The Warren Ins. Co.*, it was held, that a loss by collision, without any fault on either side, is a loss by the perils of the sea, within the protection of the policy of insurance: 14 Pet. 99. And in *Matter of Schooner Reeside*, 2 Sumn. 567, Judge Story describes "the dangers of the sea in a bill of lading, to be equivalent to perils of the sea in a policy of insurance." In *Abbot on Shipping* we find the case of a ship in which goods were conveyed being run down in daylight and not in a tempest, by one of two other ships that were sailing in an opposite direction. As, under the circumstances, there was no blame imputable to the master or crew of the ship, the loss was held to fall within the meaning of the exception in the bill of lading, and to have happened by a peril of the sea: Part 3, c. 4, p. 209. We, therefore, think that the inferior court erred in rejecting the testimony, offered to show that the tobacco, the value of which is sued for, was lost in consequence of a collision, and that such collision happened without any fault on the part of the defendants, or their agents.

It is, therefore, ordered, that the judgment of the parish court be reversed, and that the case be remanded for a new trial, with instructions to the judge of that court, to admit the testimony offered to show the circumstances attending the collision mentioned in the defendant's answer. The plaintiff and appellee to pay the costs of this appeal.

"PERILS OF THE SEA," MEANING OF, GENERALLY.—The terms "perils of the sea," and "dangers of the river," as used in bills of lading and policies of insurance, are synonymous, and cover the same incidents and losses. They are used interchangeably: *Lloyd v. Iron Screw Collier Co.*, 3 H. & C. 284; *Baxter v. Leland*, 1 Abb. Adm. 348; *Jones v. Pitcher*, 3 Stew. & P. 135; S. C., 24 Am. Dec. 716; *Hays v. Kennedy*, 3 Grant, 351; and there is no essential difference between an exception of "unavoidable dangers of the river," and of "dangers of the river;" for "the carrier must use all reasonable caution in the navigation of his boat or vessel to avoid accidents:" *The Favorite*, 2 Biss. 502. The meaning of "dangers of the sea," was regarded as equivalent to that of "acts of God," in *Williams v. Grant*, 1 Conn. 487. In that case, the vessel transporting the goods of the plaintiff ran upon a rock, and was bilged, in consequence of which the shipment was lost. The bill of lading contained an exception of "dangers of the sea." Gould, J., after laying down the general rule as to the common carrier's liability, as it existed at the common law, said: "The defendants are indeed, by an express exception in the bill of lading, excused, so far as regards losses caused by 'dangers of the sea.' This exception does not seem at all to qualify their liability; for, by 'dangers of the sea,' are meant no other than inevitable perils, or accidents, upon that element; and by such perils or accidents, common carriers are *prima facie* excused, whether there is any such express exception or not." And in *Tuckerman v. Stephens and Condit Transportation Co.*, 32 N. J. L. 320; S. C., 33 Id. 543, the court said, that the expressions, "perils of the sea" and "act of God," were only different words to express the same act of power. But this opinion does not prevail generally, and it is settled beyond controversy that "perils of the sea" is a broader term than "acts of God," and includes those accidents that are peculiar to navigation and to the sea, or arise from the natural workings of that element, and could not be prevented by the use of care and skill: Angell on Carriers, sec. 168, 5th ed.; *Laveroni v. Drury*, 8 Exch. 166; *The Favorite*, 2 Biss. 502; *Dibble v. Morgan*, 1 Woods, 406; *Bullard v. Roger Williams Ins. Co.*, 1 Curt. C. C. 148; *Merrill v. Arey*, 3 Ware, 215; *Anthony v. Etna Ins. Co.*, 1 Abb. (U. S.) 343; *Transportation Co. v. Downer*, 11 Wall. 129; *Christensen v. American Express Co.*, 15 Minn. 270; *McArthur v. Sears*, 21 Wend. 190; *Tysen v. Moore*, 56 Barb. 442; *Williams v. Branson*, 1 Murph. 417; S. C., 4 Am. Dec. 162; *Hays v. Kennedy*, 3 Grant's Cas. 351; *Gordon v. Buchanan*, 5 Yerg. 72; *Turney v. Wilson*, 7 Id. 340. But this phrase, as used in bills of lading, does not cover losses that arise from the negligence or carelessness of the carrier, or such as could be avoided by the use of discretion and reasonable skill: *Lloyd v. Iron Screw Collier Co.*, 3 H. & C. 284; *The Rocket*, 1 Biss. 154; *Schooner Reeside*, 2 Sumn. 567; *Delekam v. Vose*, 3 Blatchf. 44; *The Portsmouth*, 9 Wall. 682; S. C., 2 Biss. 56; *Dibble v. Morgan*, 1 Woods, 406; *Case of Steamer Wathan*, 13 Op. Att. Gen. 119; *Jones v. Pitcher*, 3 Stew. & P. 135; S. C., 24 Am. Dec. 716; *Hill v. Sturgeon*, 28 Mo. 323; *Slocum v. Fairchild*, 7 Hill, 292; S. C., 19 Wend. 329; *Williams v. Branson*, 1 Murph. 417; S. C., 4 Am. Dec. 162; and

the "dangers of navigation" of a public canal are such as are incidental to it when the trip is made in conformity to the public regulations of which the carrier is bound to take notice; consequently, damage from bilging in a lock which was entered in contravention of the rules, must be compensated by him: *Atwood v. Reliance Transportation Co.*, 9 Watts, 87; S. C., 34 Am. Dec. 503. In the interpretation of these phrases, many cases have arisen; those involving the same facts will be arranged together, and the different subjects will be considered separately.

COLLISIONS.—In the absence of circumstances tending to charge the loss to the carrier, a collision is a peril of the sea, and the carrier is not liable for the loss occasioned thereby; and the same rule prevails as to the liabilities of insurers: *Buller v. Fisher*, 3 Esp. 67; *De Vaux v. Salvador*, 4 Ad. & El. 420; *Peters v. Warren Ins. Co.*, 3 Sumn. 389; S. C., 14 Pet. 99; *The Steamboat New Jersey*, Olcott, 444; *Van Hern v. Taylor*, 7 Rob. (La.) 201 (the principal case); S. C., 2 La. Ann. 587; *Caldwell v. St. Louis Perpetual Ins. Co.*, 1 Id. 85; *Walker v. Boston and Hope Ins. Cos.*, 14 Gray, 288; *Nelson v. Suffolk Ins. Co.*, 8 Cush. 477; *Plaisted v. Boston and Kennebec Steam Nav. Co.*, 27 Me. 132; *Mathews v. Howard Ins. Co.*, 13 Barb. 234; S. C., 1 Kern. 9; *Hays v. Kennedy*, 3 Grant's Cas. 351; S. C., 41 Pa. St. 378. If the collision happens through the negligence of the master, the exception "perils of the sea" has different meanings, according as it is used in a bill of lading or a policy of insurance. In the former case, it is held not to include collisions: *Grill v. General Iron Screw Collier Co.*, L. R., 1 C. P. 600; *Lloyd v. General Iron Screw Collier Co.*, 3 H. & C. 284; S. C., 10 L. T. (N. S.) 586; *Jones v. Pücher*, 3 Stew. & P. 135; S. C., 24 Am. Dec. 716; *Marsh v. Blythe*, 1 McC. 360; but in the latter case, that is, where the exception is in a policy of insurance, the collision is regarded as a peril of the seas; *Smith v. Scott*, 4 Taunt. 126; *General Mutual Ins. Co. v. Sherwood*, 14 How. 351; S. C., 1 Blatchf. 251; *Hale v. Washington Ins. Co.*, 2 Story, 176; *Mathews v. Howard Ins. Co.*, 13 Barb. 234; *Street v. Augusta Ins. and Banking Co.*, 12 Rich. L. 13. The question as to whether the loss happened from negligence or not, is for the jury to determine: *Marsh v. Blyth*, 1 Nott & M. 170.

FIRES—EXPLOSION OF BOILERS.—"Dangers of the seas" include those perils incident to the navigation of that element rather than all that arise on it. Hence the rule generally prevails that a fire is not included in such an exception, and is not a loss by the perils of the sea: *Garrison v. Memphis Ins. Co.*, 19 How. 312; *Airey v. Merrill*, 2 Curt. 8; S. C., 3 Ware, 215; *Gilmore v. Carman*, 1 Smed. & M. 279; S. C., 40 Am. Dec. 96; *Martin v. Salem Marine Ins. Co.*, 2 Mass. 420. In Alabama, a different rule prevails, and by custom and usage, "perils of the sea" are regarded as including loss by fire; and it is the established rule of that state that parol evidence may be admitted to prove such usage: *Sampson v. Gazum*, 6 Port. 123; *Ezell v. Miller*, Id. 307; *Ezell v. English*, Id. 311; *Hibler v. McCartney*, 31 Ala. 501; *McClure v. Cox*, 32 Id. 617.

There seems to be a difference of opinion as to whether an explosion of a boiler is a peril of the sea; in the federal courts it has been decided that a loss from such a cause is not within the exception: *The Bark Edwin*, 1 Sprague, 477; S. C., 1 Cliff. 322; S. C., 24 How. 386; *Propeller Mohawk*, 8 Wall. 153; but in *The Bark Edwin*, it was not contended that the explosion was a peril of the sea, and the court assumed that it was not; and in *The Propeller Mohawk*, no reason was given for the opinion. In the case of *The Citizens' Ins. Co. v. Glasgow*, 9 Mo. 406, this question arose. A policy insured against losses arising from "the rivers, fires, etc., and all other perils, losses,

and misfortunes which should come to the damage of said steamboat, according to the general laws of insurance." The boat having been destroyed, suit was brought against the company, and the question was, was this loss covered by the policy? Napton, J., in delivering the opinion of the court, said: "It is remarkable, considering the numerous losses arising from this cause in the navigation of the western waters, that but one case can be found in which this question has been decided. That is the case of *Perrin's Adm'r v. The Protection Ins. Co.*, 11 Ohio, 147; S. C. [38 Am. Dec. 728]. The supreme court of Ohio in that case were of opinion that the policy covered a loss occasioned by explosion. The court seemed to consider that this was a peril incident to the navigation of a river by steam vessels, as much so as a loss by wind would be a peril of the sea, to which vessels propelled by that element are liable. It is no answer to this view of the subject, to say that a peril by steam is not peculiar to the water, but may happen on land as well as at sea, for the same may be said in relation to the dangers arising from the violence of the winds. An injury to the motive power of a sea vessel by inevitable accident, is admitted to be within the enumerated perils of a marine policy; for the same reason, an injury to the motive power of a steam vessel arising from inevitable accident, is within the perils of the river incident to such vessels. If steam were a power entirely within the control of man, the conclusion would be different. But I apprehend that whatever natural philosophers may think of this, the elements which combine to create the power of steam, are as entirely within the reach of accident, and are no more subject to fixed laws than the elements which propel the ship at sea. Whatever may be the theories on either subject, universal experience is that no human skill can entirely guard against accidents, either in the one case or the other. We think, therefore, that the doctrine of the supreme court of Ohio is reasonable and right."

JETTISON.—It is well settled that if goods are thrown overboard to avert impending danger, the loss is from a peril of the seas. But the danger must be such as to justify the jettison: *The Milwaukee Belle*, 2 Biss. 197; *Schooner Thomas Ewing v. Ireland*, Crabbe, 405; *Lawrence v. Minturn*, 17 How. 100; *Dupont de Nemours v. Vance*, 19 Id. 162; *Rice v. Homer*, 12 Mass. 230. And if the peril is attributable to the neglect or want of skill on the part of the master, the jettison is not then included within the exception: *The Jenny Jones*, Deady, 82; *The Portsmouth*, 9 Wall. 682; S. C., 2 Biss. 56. In *The Portsmouth*, the captain, in the night-time, and in a fog, entered a port, supposing it to be his port of destination, and ran aground. In order to lighten the boat, he threw over some of the cargo. The court held this not to be a loss from the perils of the sea, saying: "A loss by a jettison occasioned by a peril of the sea, is, in ordinary cases, a loss by perils of the sea. But it is well settled that if a jettison of a cargo, or a part of it, is rendered necessary by any fault or breach of contract of the master or owner of the vessel, the jettison must be attributed to that fault, or breach of contract, rather than to the sea peril, though that may also be present and enter into the case." But if the circumstances justified the attempted entrance the rule would be different. Thus where a vessel arrived off Mobile towards evening, and there being indications of bad weather, the captain, being unable to obtain a pilot, determined to follow a pilot-boat up the bay; in doing so, the vessel ran aground; and in order to lighten her, part of the cargo was jettisoned. It was held that the grounding could not be attributed to the captain's fault or misconduct, and that the jettison was a loss from perils: *Schooner Thomas Ewing v. Ireland*, Crabbe, 405. Where goods which have been improperly

stowed are jettisoned, in consequence of perils, the carrier is nevertheless liable: *The Peytona*, 2 Curt. 21; *The Delaware*, 14 Wall. 579. In that case the goods were stowed on deck contrary to a custom that they should be stowed in the hold; the defendant set up as a defense that the goods were jettisoned on account of a peril of the sea. But the court held him liable, saying: "Goods, though lost by perils of the sea, if they were stowed on deck without the consent of the shipper, are not regarded as goods lost by the act of God, within the meaning of the maritime law, nor are such losses regarded as losses by perils of the sea which will excuse the carrier from delivering the goods shipped to the consignee, unless it appears that the manner in which the goods were stowed is sanctioned by commercial usage, or unless it affirmatively appears that the manner of stowage did not, in any degree, contribute to the disaster; that the loss happened without any fault or negligence on the part of the carrier, and that it could not have been prevented by human skill and prudence, even if the goods had been stowed under deck, as required by the general rules of the maritime law."

PIRACY, THEFT, CAPTURE OR DETENTION OF VESSEL BY FOREIGN POWER.—Where a vessel is captured by pirates, the loss is from a peril of the seas: *Pickering v. Barkley*, Style, 132; *Barton v. Walliford*, Comb. 56; so also is the loss of a cargo of sugar, caused by a mob breaking into the vessel, and seizing it: *Babbitt v. The Sun Mutual Ins. Co.*, 23 La. Ann. 314; but theft is not a peril of the sea: *De Rothschild v. Royal Mail Steam Packet Co.*, 21 L. J. Exch. 273; *King v. Shepherd*, 3 Story, 349; nor are depredations on a ship's stores or on her cargo, committed by her passengers or crew in consequence of a short allowance, made necessary by the length of the voyage: *The Gold Hunter*, 1 Blatchf. & H. 300. Arrests, restraints, or detentions by foreign powers are not perils: *Parkhurst v. Gloucester Mut. Fishing Ins. Co.*, 100 Mass. 301; nor a seizure and confiscation of the goods as contraband: *Spence v. Chadwick*, 10 Q. B. 517; and if a ship be driven by stress of weather on an enemy's coast, it is not a loss from perils, but from capture: *Green v. Elmshie*, Peake (N. P.), 278; *Livie v. Johnson*, 12 East, 648; though the contrary was held in *United States v. Hall*, 6 Cranch, 171; and see *Ionides v. Universal Marine Ins. Co.*, 14 C. B. (N. S.) 259; and the averment of a loss by perils is not sustained by proof that the vessel was sunk in consequence of being fired upon by another vessel under a mistake: *Cullen v. Butler*, 1 Stark. 138; S. C., 5 Man. & Sel. 461.

IMPERFECT STOWAGE—SWEATING, STEAMING, OR BLOWING—VERMIN, LOSSES BY.—A master can not stow goods on deck without the consent of the owner, and if goods are so stowed, they are at the risk of the master; and if they are unavoidably lost or damaged, he can not protect himself from his liability by an exception in the bill of lading of dangers of the sea: *The Rebecca*, 1 Ware, 188; and this is so where they are washed overboard in a gale: *Waring v. Morse*, 7 Ala. 343; or if the goods so stowed were jettisoned in consequence of a peril: *The Delaware*, 14 Wall. 579; *The Peytona*, 2 Curt. 21; or were struck off into the water on account of a collision with another boat: *Daggett v. Shaw*, 3 Mo. 285; and damage to insured goods by sea water, if occasioned by bad stowage, is not a loss from perils: *The Newark*, 1 Blatchf. 203; *Fleming v. Marine Ins. Co.*, 3 Watts & S. 144; S. C., 38 Am. Dec. 747; though in *Underwriters' Agency v. Sutherland*, 55 Ga. 266, the contrary was held, and it was there decided that unless such improper stowage was occasioned by or acquiesced in by the assured or his agent, the damage was from perils.

Damages done to a cargo from the sweating of the hold are not losses from perils of the sea: *Montgomery v. Ship Abby Pratt*, 6 La. Ann. 410; *The*

Star of Hope, 17 Wall. 651; *Lamb v. Parkman*, 1 Sprague, 343; *Baxter v. Leland*, 1 Abb. Adm. 348. Sweating usually results from imperfect stowage or a want of ventilation in the hold, and springs from human agencies rather than from perils of the sea. A loss resulting from the dampness of the hold is not a loss by the perils of the sea: *Baker v. Mfg. Ins. Co.*, 12 Gray, 603; but in the case of *Clark v. Barnwell*, 12 How. 282, spools of thread put up in boxes were damaged by the humidity and dampness of the vessel, and it was held a loss from the perils of the sea. Where the damage to the goods shipped arose from the nature and collocation of the cargo, consisting of animal, vegetable, and to some extent putrescible matter, and the want of due ventilation, it is not a danger of the seas: *The Freedom*, L. R., 3 P. O. 594. However, in the case of *Montoya v. London Ass. Co.*, 4 Eng. L. & Eq. 500, a ship loaded with hides and tobacco encountered bad weather and shipped sea water, whereby the hides were wet and rendered putrid. Neither the tobacco nor the packages containing it were immediately in contact with nor directly damaged by the sea water, but the tobacco was damaged and deteriorated in flavor by the fetid odor from the putrid hides, and this was held a loss from the perils of the sea.

"Blowing" is occasioned by the water in the bottom of the ship being thrown up between the sides and the ceiling by the rolling of the ship, and thus forced through the cargo; such a loss is from the perils of the sea: *Crosby v. Grinnell*, 9 N. Y. Leg. Obs. 281; but where oil was stowed and some of it escaped, and the water and the oil were blown, thereby damaging some hemp, the loss was held not to fall within the exception, the weather having been good during the voyage, and nothing extraordinary occurring: *Bearse v. Ropes*, Sprague, 331.

It is firmly settled that losses occasioned by rats do not result from perils. Kent says: "The better opinion would seem to be, that the insurer is not liable for this sort of damage, because it arises from the negligence of the common carrier, and it may be prevented by due care, and is within the control of human prudence and sagacity." 3 Kent's Com., 12th ed., 300, and note; Angell on Carriers, secs. 169, 170; *Laveroni v. Drury*, 8 Exch. 166; S. C., 22 L. J. Exch. 2; S. C., 16 Jur. 1024; *Hunter v. Potts*, 4 Camp. 203; *Kay v. Wheeler*, 36 L. J. C. P. 180; S. C., L. R., 2 C. P. 302; *The Bark Carlotta*, 9 Ben. 1; *Solaris v. Ramsay*, 8 Id. 139; *Aymar v. Astor*, 6 Cow. 266; and this is so, though every precaution against them is taken: *Kay v. Wheeler*, *supra*; *Laveroni v. Drury*, *supra*; and evidence that by mercantile usage they were regarded as perils is inadmissible: *Aymar v. Astor*, *supra*. There is but one case holding a contrary doctrine, that of *Garrigues v. Coze*, 1 Binn. 592; S. C., 2 Am. Dec. 493; and there the court decided that a leak occasioned by rats was a loss within the policy. Damages caused by worms eating the ship's bottom are not regarded as dangers of the sea: *Rohl v. Parr*, 1 Esp. 445; *Martin v. Salem Mar. Ins. Co.*, 2 Mass. 420; *Hazard v. New England Marine Ins. Co.*, 1 Sumn. 218; S. C., 8 Pet. 557; thus in this last case a vessel sustained an injury at Cape de Verde islands in the loss of her false keel, thereby becoming exposed to the action of the worms, which obtained entrance into her and destroyed her; the loss was held not to be from a peril of the seas.

INJURIES IN TIDE HARBORS, WHILE IN DOCK, FROM LOW WATER AND GROUNDING.—The ebbing of the tide in a tide harbor is a danger of the sea, if the loss occasioned thereby is extraordinary in its nature. Thus, where a stoutly built ship, between two and three years old, and without circumstances to lead to the supposition that she was rotten or had met with any

calamity, after taking the ground was discovered to leak so freely that a surveyor was called in who said that it was from her lying so badly on the ground, the loss was held to be from an extraordinary cause, and from the perils of the sea: *Potter v. Suffolk Ins. Co.*, 2 Sumn. 197. So, where a vessel took the ground where it was intended she should, but in doing so struck against some hard substance by which two holes were made in her bottom and her cargo was damaged, the damage is from a peril: *Kingsford v. Marshall*, 8 Bing. 458. And where, when the tide left the vessel, a cracking noise was heard, and afterwards on the return of the tide there was a considerable swell in the harbor and the ship struck the ground hard several times and it was discovered that eighteen knees were broken, the loss was regarded as resulting from the perils of the sea: *Fletcher v. Inglin*, 2 Barn. & Ald. 315. But damage resulting from the ship taking the ground in a spot where she is properly placed for unloading, there being no accident, will not be ascribed to perils, but to wear and tear: *Magnus v. Buttemer*, 11 C. B. 876. And so where a ship was hove down on a beach to repair and was damaged it was held not to be a loss by perils: *Thompson v. Whitmore*, 3 Taunt. 227. Where a vessel is taken into a dock for repairs, the liability of the insurer or carrier continues, and the exemption applies as well when the vessel is there as when she is on the high seas. Thus, in *Phillips v. Barber*, 5 Barn. & Ald. 161, a ship was placed in a graving dock to be repaired; while there, by the violence of the wind and sea, she was thrown over on her side, struck the ground with great violence, and was bilged; this was regarded as a loss from the perils of the sea; and the same was held in *Laurie v. Douglass*, 15 Mee. & W. 746. In that case a vessel was taken into a dock to discharge her cargo. For this purpose she was fastened by tackle on one side to a loaded lighter lying outside her, and on the other to a barge lying between her and the wharf; while being unloaded, the tackle broke, she canted over, and the water got in through her ports, injuring the goods. So, where a ship was hauled up on a marine railway to be repaired, and while being hauled up was blown over and bilged, the loss was ascribed to perils of the seas: *Ellery v. New England Ins. Co.*, 8 Pick. 14.

Low water impeding the carriage is not regarded as a danger of the rivers or seas: *Broadwell v. Butler*, 6 McLean, 296; S. C., 1 Newb. Adm. 171; *Hatchett v. Steamer Compromise*, 12 La. Ann. 783; *Mahon v. Steamer Olive Branch*, 18 Id. 107; *Cowley v. Davidson*, 13 Minn. 92. But if, in consequence of the lowness of the water, the vessel grounds, the loss is regarded as resulting from perils: *Transportation Co. v. Downer*, 11 Wall. 129; *Fireman's Ins. Co. v. Powell*, 13 B. Mon. 311. Though this is not so if the vessel struck the bar and stuck fast, in broad daylight, the bar being well known: *The Ocean Wave*, 3 Biss. 317. Nor if after the vessel had struck, the carrier was negligent in removing the cargo: *Charleston and Columbia Steamboat Co. ada. Bason*, Harper's L. 262.

SNAGS OR OBSTRUCTIONS—RUNNING ON SHORE—BOISTEROUS WEATHER OR ROLLING OF SEA.—The question as to whether an injury from a snag is a loss resulting from dangers of the river depends upon whether the master has used skill or not to avoid it. If the master has not been guilty of a lack of care, then the loss is from the dangers of the river: *The Favorite*, 2 Biss. 502; *Boyce v. Welch*, 5 La. Ann. 623; *Redpath v. Vaughan*, 52 Barb. 489; S. C., affirmed in 48 N. Y. 655; *Johnson v. Friar*, 4 Yerg. 48; S. C., 26 Am. Dec. 215. In *The Favorite*, a barge was broken into by a stump concealed from view and not even marked by a ripple; and in *Redpath v. Vaughan*, the boat had struck a hidden obstruction not existing there before, except for a very brief period,

and which had recently been carried there by the action of the water. In both cases the loss was ascribed to perils of the seas. But if the accident is attributable to the unskillfulness or negligence of the captain, then the loss springs from human agencies and not from the dangers of the river: *Christenson v. American Express Co.*, 15 Minn. 270; *Gordon v. Buchanan*, 5 Yerg. 71; *Graham v. Davis*, 4 Ohio St. 362; *Case of Str. Wathan*, 13 Op. Att'y Gen. 119. Or if after the accident happened the captain makes no exertions to dry and thus save the cargo, the carrier is liable: *Bird v. Cromwell*, 1 Mo. 81; and the carrier will not be discharged from liability unless he proves he used due diligence: *Graham v. Davis*, 4 Ohio St. 362; *Whitesides v. Russell*, 8 Watts & Serg. 44. The question whether there has been negligence or not is for the jury: *Humphreys v. Reed*, 6 Whart. 435. The same rules apply when a carrier attempts to run bridge piers. Thus where a steamboat towing three loaded barges down the Mississippi is driven against a pier by a sudden and unexpected gust of the wind, the loss is from dangers of the river: *The Lady Pike*, 2 Biss. 141; S. C., 8 Am. L. Reg. (N. S.) 614; but the loss can not be ascribed to such dangers when a vessel attempts to run bridges in a high and uncertain state of the weather, between which it is dangerous to pass if the wind is high or squally: *The Mohler*, 21 Wall. 230; S. C., 2 Biss. 505; or where the accident in running against a pier results from ignorance or want of knowledge: *The Lady Pike*, 21 Wall. 1; or where an attempt is made to pass a narrow bend in a dangerous state of the weather, and part of the cargo is struck overboard by a well-known cypress at that point: *Williams v. Branson*, 1 Murph. 417; S. C., 4 Am. Dec. 562. If by the force and violence of the winds and waves, a ship strikes upon the rocks and is thereby bilged, broken, and filled with water, wrecked and cast away, the loss is from perils: *Heyman v. Parish*, 2 Camp. 149; so where a carrier on a dark and stormy night, at the entrance of a harbor difficult of access, mistook a light on the shore, in a line with the pier light, for the latter, whereby the vessel went ashore, the damage is attributed to the same cause: *The Juniata Paton*, 1 Biss. 15. A dense fog is a danger of navigation; but if the carrier runs at full speed along the shore, and goes ashore, the loss is attributed to his bad seamanship: *The Rocket*, Id. 354; or if during the continuance of the fog, he runs in calm weather upon a well-known cape: *Bazin v. Steamship Co.*, 3 Wall. jun. 229. If the carrier makes a deviation which is not excusable, and encounters a storm which drives him on a shoal, and the vessel is totally lost, the loss is not ascribable to perils of the sea: *Hand v. Baynes*, 4 Whart. 204; and where a buoy was in its proper position when the master left port, but drifted some one hundred and fifty or two hundred yards out of its proper position, and the master in approaching the harbor steered for the buoy supposing it to be where he had left it, and when within a few lengths discovered his mistake and attempted to turn the vessel, but in doing so, her keel struck, causing the loss, it was held not to result from perils of the sea: *Reaves v. Waterman*, 2 Speer, 197. And if from the tempestuousness of the weather the ship is driven on shore, but the captain is guilty of gross negligence in not protecting the loss, it will not fall within the exception: *Propeller Niagara v. Cordes*, 21 How. 7.

In *Livie v. Janson*, 12 East, 648, an American ship insured from New York to London, warranted free from American condemnation, having for the purpose of eluding her national embargo slipped away in the night, was by stress of the weather driven on shore, where she sustained but partial damage, but she was seized next day, gotten off with great expense, and condemned; the court held that as there was an ultimate total loss from a peril excepted out of the policy, the assured could not recover for any previous partial loss, on the

principle that *causa proxima et non remota spectatur*. This case, at the first glance, seems to differ from that of *Ionides v. Universal Marine Ins. Co.*, 14 C. B. (N. S.) 259; in that case there was a policy on six thousand five hundred bags of coffee, warranted free from seizure. In consequence of the extinguishment of a light by the American government, as an act of hostility, the vessel ran ashore. Persons on the coast had rescued one hundred and fifty bags of the coffee, and could have saved one thousand more, but for the interference of the soldiers; it was held that the loss of that which could have been saved was a loss by capture, but that the remainder was lost from a peril of the seas. It was contended that the entire loss was from capture. But the court held it was not, saying: "They were incapable of being saved; and it seems to me to be an abuse of words to say that a man captures a thing which must of necessity be snatched from his grasp the very next moment, of which he can have no enjoyment and no possession. * * * To say that a man captures a cargo which is in a ship on the rocks and can not by possibility be got at, is to say that which has no foundation in fact. The five thousand three hundred and fifty bags were lost to the assured and to all mankind from the moment the ship settled on the rocks, without a possibility of their being brought on shore. The result is, that, in my opinion, of the six thousand five hundred bags of coffee, five thousand three hundred and fifty were lost by the perils of the sea."

Where a vessel, stanch and stout, with the cargo properly stowed, encounters tempestuous weather, in consequence of which the sea breaks over her and she ships water, thereby damaging the cargo, the loss will be attributed to perils of the sea: *Hunt v. Propeller Cleveland*, 6 McLean, 76; 8 C., 1 Newb. Adm. 221; *Hooper v. Rathbone*, Taney, 519; *Rich v. Lambeth*, 12 How. 347, and where livestock was shipped warranted free from mortality and jettison, and on account of the agitation of the vessel in a storm the animals were killed, the loss was held to be from perils: *Lawrence v. Aberdeen*, 5 Barn. & Ald. 107; and the same was held, in *Gabay v. Lloyd*, 3 Barn. & Cress. 793, where a similar policy was effected on horses, and in consequence of the agitation of the ship in a storm they broke down the partitions that separated them, and by their kicking bruised and wounded each other so that they all died. But where a vessel foundered in a storm, not so much from the violence of the elements as from a want of ordinary exertions of human skill and prudence, the loss is not from dangers of the sea: *Tuckerman v. Stephens*, 32 N. J. L. 320; and retardation or delay of a voyage though by reason of tempestuous weather is not a peril, and meat shipped and rotting on account of such delay and thrown overboard, the loss does not fall within the exception: *Taylor v. Dunbar*, L. R., 4 C. P. 206.

Mere rolling of a vessel by a cross sea is not a danger of the sea, as it is an ordinary incident to every voyage upon the sea: *Schooner Reeside*, 3 Sumn. 567; though in *Bullard v. Roger Williams Ins. Co.*, 1 Curt. C. C. 148, it was held that damage done by a heavy cross sea fell within the meaning of the term, as it was not the ordinary action of the sea, and damage caused to soap from the long agitation it had been subject to in a rough passage, was attributed to perils of the sea: *McKinlay v. Morrish*, 21 How. 343, and *Washington Mutual Ins. Co. v. Reed*, 20 Ohio, 199, held an injury to a flatboat by waves made by a steamboat to be included within the term perils, though the steamboat was of ordinary size, and the swell raised by her an ordinary one.

MISCELLANEOUS INSTANCES.—If the loss to a vessel happens from the ordinary circumstances of a voyage, the loss is not ascribed to perils of the sea.

Thus if the damage result from mere wear and tear: *Bullard v. Roger Williams Ins. Co.*, 1 Curt. C. C. 148; *Cole v. Marine Ins. Co.*, 3 Wash. 159; *Washington Mutual Ins. Co. v. Reed*, 20 Ohio, 199; *Magnus v. Buttemer*, 9 Eng. L. & Eq. 461; *Dupeyre v. Western Marine and Fire Ins. Co.*, 2 Rob. (La.) 457; S. C., 38 Am. Dec. 218. But if a vessel be seaworthy at the time of her sailing, and afterwards suddenly springs a leak and founders without any stress or apparent cause, it is a loss by perils: *Patrick v. Hallett*, 1 Johns. 241. Unskillfulness of a pilot is not a peril: *Harvy v. Pike*, N. C. T. R. 62; 8 Cl., 7 Am. Dec. 696; nor desertion of seamen: *The Bark Ethel*, 5 Ben. 154; nor damages resulting from the crew's barratrously boring holes in a ship's sides or bottom: *The Chasca*, L. R., 4 Ad. 446; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213. But where in moving a ship from one part of a harbor to another it became necessary to send two of the crew on shore to make fast a new line and cast off the rope by which the ship was made fast, and these two men being immediately impressed and carried away and not allowed by the press gang to cast off the rope in question, the ship in consequence thereof going ashore, it was held a loss from perils of the sea: *Hodgson v. Malcolm*, 2 Bos. & Pul. N. R. 336. And where a vessel taken in tow by a ship of war, in order to keep up, was obliged to use an extraordinary press of sail, and during a gale of wind and a high sea shipped a quantity of water, by which goods were damaged, the loss was regarded as falling within the exception: *Hagedorn v. Whitmore*, 1 Stark. 167. But not so where damage results from water leaking through the decks: *The Bark Antoinetta C.*, 5 Ben. 564. Injury done by the escaping of steam from an unknown cause, and without the fault of the officers, results from perils: *Union Ins. Co. v. Groom*, 4 Bush, 289. And where cattle placed upon a lighter to be landed became frightened and broke the chains which tied them, and rushed overboard and were lost, the loss was held to be from the same cause: *Anthony v. Ettna Ins. Co.*, 1 Abb. (U. S.) 343. But the death of slaves on account of a want of suitable and sufficient provision, occasioned by extraordinary delay in the passage, is not a loss by perils but from natural death: *Tatham v. Hogsdon*, 6 T. R. 656. And where a vessel disabled by perils puts into a port to repair, and the master, having no other means, is obliged to sell part of the cargo to pay the expense, the loss is not from perils, on the principle that *causa proxima et non remota spectatur*: *Dyer v. Piscataqua F. & M. I. Co.*, 53 Me. 118; *Powell v. Gudgeon*, 5 Mau. & Sel. 431. But where from storminess of the weather a vessel is obliged to put into a port, and a pestilential disorder breaks out and disables her crew, rendering it impossible for her to pursue her voyage, the loss falls within the perils insured against (though from the case it can only be inferred that the policy insured against perils of the seas, as the form of the policy does not appear): *Williams v. Smith*, 2 Cai. 1; S. C., 2 Am. Dec. 209. Deflection of the compass from some accidental or unforeseen cause may be a danger, but before the court would consider it an excuse for accident, it must be clearly shown by undoubted proof that the officers of the vessel discharged their duty: *The Rocket*, 1 Biss. 354.

PRESUMPTION AS TO VESSEL NEVER HEARD FROM.—If a vessel sails and is never heard from, there is a presumption that she has been lost by a peril of the seas: *Watson v. King*, 1 Stark. 121; *Green v. Brown*, 2 Stra. 1199; *Cohen v. Hinckley*, 2 Camp. 51; *Troemlow v. Oswin*, Id. 85; *Koster v. Reed*, 6 Barn. & Cress. 19; *Gordon v. Bourne*, 2 Johns. 150; but the plaintiff must prove that when she left the port of outfit she was bound upon the voyage insured: *Cohen v. Hinckley*, 2 Camp. 51.

BURDEN OF PROOF.—If damage happens to a vessel while on her voyage,
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there is no presumption that it resulted from a peril of the sea, but the burden of proving that such a cause was the occasion of the loss, is upon the party claiming that it so happened: *Rich v. Landon et al.*, 12 How. 347; *Bearse v. Ropes*, Sprague, 331; *Schooner Emma Johnson*, Id. 527; *Hooper v. Rathbone*, Taney, 519; *The Mohler*, 21 Wall. 230; S. C., 2 Biss. 505; *The Rocket*, 1 Id. 354; *The Cleveland*, 1 Newb. Adm. 221; *The Juniata Paton*, 1 Biss. 15; *Bulard v. Roger Williams Ins. Co.*, 1 Curt. C. C. 148; *Dunsmuth v. Wade*, 2 Scam. 285; *Leftwich v. St. Louis Perp. Ins. Co.*, 5 La. Ann. 706; *Hill v. Sturgeon*, 28 Mo. 323; *Redpath v. Vaughan*, 52 Barb. 489; S. C., 48 N. Y. 655; *Ehcart v. Street*, 2 Bailey, 157; *Graham v. Davis*, 4 Ohio St. 362; *Whitesides v. Russell*, 8 Watts & S. 44; *Turney v. Wilson*, 7 Yerg. 340; S. C., 27 Am. Dec. 515; and the loss must be clearly traced to the peril alleged: *The Schooner Emma Johnson*, 1 Sprague, 527; *The Ship Compta*, 4 Saw. 375; *Fleming v. Marine Ins. Co.*, 3 Watts & S. 144; S. C., 38 Am. Dec. 747; but if the carrier has shown the loss to be from the perils of the sea, then the burden of proof is shifted, and it is incumbent on the plaintiff to show negligence or want of care: *The Rocket*, 1 Biss. 354; *The Cleveland*, 1 Newb. Adm. 221; *Clark v. Barnwell*, 12 How. 272; *Railroad Co. v. Reeves*, 10 Id. 177; though the contrary was held in *Graham v. Davis*, 4 Ohio St. 362, where it was decided that it was not only incumbent on the carrier to show a loss by an excepted peril, but also that proper care and skill were used to prevent it. If from the evidence it is doubtful whether the loss resulted from the perils of the sea or not, the carrier is liable: *The Live Yankee*, Deady, 420; *Speyer v. The Mary Belle Roberts*, 2 Sawy. 1; *Baker v. Manuf. Ins. Co.*, 12 Gray, 603; but the contrary was held in *Muddle v. Stride*, 9 Car. & P. 380, where Denman, C. J., said to the jury: "If, on the whole, in your opinion, it is left in doubt what the cause of the damage was, then the defendants will be entitled to your verdict; because you are to see clearly that they were guilty of negligence, before you can find your verdict against them." And in *Tysen v. Moore*, 56 Barb. 442, it was held that where a cask is properly stowed, damage done to it will be ascribed to perils of the sea, unless it is affirmatively shown to be due to other causes. Evidence of a custom of merchants that carriers in flatboats are exempted from liability for all losses, unless they proceed from their negligence or dishonesty, is inadmissible: *Turney v. Wilson*, 7 Yerg. 340; S. C., 27 Am. Dec. 515.

UNION BANK v. HYDE.

[7 ROBINSON, 418.]

HOLDER OF PROMISSORY NOTE IS NOT BOUND TO GIVE NOTICE to any except the one whom he intends to hold liable.

PAYMENT BY INDORSEER RAISES PRESUMPTION OF INDEBTEDNESS, and he must distinctly allege that he paid without notice of the dishonor, in order to set off the payment in a suit by the holder on another note.

PARTY ALLEGING ERROR AS BASIS OF ACTION must show it, or at least show satisfactorily that the evidence of it is exclusively in the power of his adversary.

APPEAL from the parish court of New Orleans. The opinion states the case.

Denis, for the plaintiffs.

H. H. and G. Strawbridge, for the appellants.

By Court, BULLARD, J. This action was commenced on the first of February, 1843, by the Union Bank, as the holder of two promissory notes drawn by E. D. Hyde & Co., and indorsed by their co-defendants T. R. Hyde & Co., which appear to have been regularly protested and notice given to the indorsers. The drawers allege in defense that about the eighth day of November, 1836, T. R. Hyde & Brother, being the holders of several promissory notes amounting to two thousand seven hundred and forty-eight dollars and eight cents, did at that time, and on the sixth of December, discount said notes in the Union Bank, whereby the plaintiffs became owners of the same. That they were by the plaintiffs remitted to the state of Mississippi, where they were due and payable; but not being paid at maturity were returned to the plaintiffs, and on their demand taken up and settled by the said Hyde & Brother, "who believed the said notes to have been protested, notified, etc.," but said respondents show that in truth and fact it was not so. That the said T. R. Hyde & Brother, on proceeding to obtain payment from the other parties, found that the plaintiffs had so negligently and illegally managed the said affair, that they had totally lost all recourse on any of the parties capable of paying. That the notes have been duly transferred to the respondents, who plead the same in compensation, and pray judgment in their favor for the balance. The indorsers join in this defense. The parish court gave judgment for the plaintiffs, and the defendants have appealed.

It is now so well settled, as not to require a reference to authorities, that the holder of a promissory note, on which there are several indorsers, is not bound to give notice to any except the one whom he intends to hold liable, and that the indorser so notified has no right to complain of the holder, that his previous indorsers were not notified. If he wishes to secure his recourse, he must give notice himself, if it has not been given by the holder. Hyde & Brother, in the case set forth in the answer, had no recourse upon the bank, upon the mere ground that the previous parties had not been duly notified, provided they were themselves notified of the failure of the drawer to pay. It is equally clear, that the bank was not acting in this matter as the agent of Hyde & Brother, and therefore, the numerous decisions declaring the liability of banks in conse-

quence of having neglected to give regular notice, have no application to the present case. The only ground, therefore, upon which the defendants can succeed in this reconventional demand is, that Hyde & Brother, their assignors, paid in error when not legally liable themselves as indorsers, in consequence of not having been duly notified of the dishonor of the notes.

If the bank were now seeking to recover of Hyde & Brother, on the protested notes set up in reconvention, it would be incumbent on it to prove affirmatively the notice of protest; and if it relied on the subsequent promise, it would have to show, that such promise was made with a full knowledge that the indorser was discharged by want of notice. Such is the substance of the cases relied on by the counsel for the appellants: *Harris v. Allnutt*, 12 La. 465; *Tickner v. Roberts*, 11 Id. 14 [30 Am. Dec. 706]; *Lambeth v. Petrovic*, 16 Id. 315, and others. But in the present case the indorsers paid and took up the note six or seven years ago, and actually recovered judgment against the drawers; which they could only do by alleging and showing that they had been compelled to take up the note as indorsers, and thereby admitting, both by the payment itself and by the proceeding afterwards against the drawers, their liability. Now, admitting that they can not be held to do an impossible thing, and to prove that they were not notified, yet they are bound at least to allege it distinctly, so as to put the opposite party fairly on their guard, especially after so great a lapse of time, and when the party complaining never set up any claim, but transferred the notes to others, thus evading one of the modes by which the bank might have been enabled to prove their liability as indorsers, by an appeal to their consciences by interrogatories on facts and articles. It appears to us clear, that an actual payment furnishes a presumption of indebtedness, although a promise to pay, *re integra*, as indorser, may not be binding without proof that the indorser knew he was not liable. Hyde & Brother took up the note, and with it the protest, and they are supposed to have in their own possession the notice of protest, if any was given; and with all this, they abstain from asking for any relief against the bank for many years, and then transfer the note to other persons, to be used in compensation.

But it is said, there is a sufficient allegation of error to put the bank upon the proof of due notice of protest. The whole of the plea must be taken together; and, although the first part states in vague terms that they settled, believing the note to have been protested, notified, etc., when, in fact, it was not so,

yet they go on to say that the affair had been managed so carelessly, that they had totally lost all recourse and had failed to recover of the previous parties, thereby clearly intending to charge the bank, not because no notice had been given to Hyde & Brother, but because the previous indorsers had been released by their negligence. In the case cited from *Garland v. Salem Bank*, 9 Mass. 408 [6 Am. Dec. 86], the error was clearly shown, and the action brought immediately after the error was discovered; and no other ground for recovery was pretended, except the want of notice to the plaintiff himself. He who alleges error as the basis of action, must show it, or at least show satisfactorily, that the evidence of it is exclusively in the power of his adversary. In *Dranguet et al. v. Prudhomme*, 3 La. 74, the court held, as a general rule, that he who affirms must prove, although there are many negative propositions which it is impossible to prove directly, such as the non-performance or non-existence of things. So where the wife sued to set aside a contract on the allegation that she was not authorized by her husband, it is impossible for her to prove that she was not authorized. It devolved on the opposite party to show that she was, upon her allegation that she was not.

But a great majority of cases of error may be shown affirmatively, and it would probably be in the power of Hyde & Brother in the present case, by producing the protest which was handed over to them by the bank, together with the note, to show whether or not it had been regularly demanded and notice given to them. It may be, that they took up the note so immediately after its protest, as that its presentation to them to be taken up, would amount in itself to reasonable notice of dishonor, especially when they knew that the previous parties resided in Mississippi, whither it was necessary to send it for collection. This view of the case renders it unnecessary to examine the plea of prescription.

Judgment affirmed.

NOTICE OF NON-PAYMENT OF NOTE: See *Union Bank v. Lea*, *ante*, 275, and note.

RECOUPMENT: See note to *Van Epps v. Harrison*, 40 Am. Dec. 314, where this subject is discussed at length.

PASCAL v. DUCROS.

[8 ROBINSON, 112.]

IN TRESPASS AGAINST SHERIFF FOR ILLEGAL SEIZURE by his deputy, evidence may be admitted to show the manner in which the act was committed, and all the concomitant circumstances.

SHERIFF MUST SEIZE ONLY DEFENDANT'S PROPERTY.—In cases of doubt he is to ascertain who is the real owner; and if after having been warned by the real owner and indemnified by the creditor, he proceeds with the levy, he is liable in damages, and the jury are to take into consideration the manner in which the seizure was made.

OBJECTION OF NON-JOINDER COMES TOO LATE after an answer to the merits.

APPEAL from the parish court of New Orleans. The opinion states the case.

Elwyn & R. Hunt, for the plaintiff.

A. Bodin, for the appellant.

By Court, BULLARD, J. This is an action of trespass against the late sheriff of the commercial court, who is charged by the plaintiff with having sent one of his deputies to her house to seize property alleged to belong to Deslonds, at the suit of Cordeviolle and Lacroix. She alleges, that he seized furniture belonging to her, notwithstanding her repeated and earnest protestations that it was not the property of the defendant in the execution. That the furniture was taken away, to the great inconvenience of her numerous family, and her great damage. That the deputy sheriff acted in utter disregard of her entreaties, and in contempt of her just rights. There was a verdict for the plaintiff for eight hundred dollars damages, and the defendant has appealed.

It is clearly shown, that the furniture seized and taken away, belonged to the plaintiff; that the deputy sheriff was notified of the fact, went away and obtained a bond of indemnity from the plaintiffs in the execution, and then persisted in making the seizure. The trespass was therefore clearly proved, and it was for the jury to appreciate the damages sustained by the plaintiff; and although sheriffs, and other public officers acting in good faith, within the sphere of their duties, and in obedience to legal process, are entitled to protection, yet when they act in a manner contrary to their own convictions of right, and upon bonds of indemnity, persons injured by their illegal proceedings, are entitled to a liberal measure of damages. The defendant and appellant relies for a reversal of the judgment, upon the following points: 1. Because improper evidence was allowed to be given to the jury; 2. Because the charge to the jury prayed

for by the defendant, was refused; 3. Because the judge ought to have awarded a new trial; 4. Because, in actions of trespass, judgment can not be rendered against one of the co-trespassers alone.

1. The improper evidence complained of, consisted in the testimony of witnesses to prove the wanton and careless way in which the deputy sheriff seized and carried away the furniture. It is said there is no allegation in the petition to authorize such evidence in aggravation. It appears to us differently. The petitioner states, that her furniture was taken away in disregard of her earnest entreaties and remonstrances; and, we think, that in actions of this kind, evidence may well be admitted to show the manner in which the act was committed, and all the concomitant circumstances.

2. The judge, instead of charging the jury as requested, told them that a sheriff, in the execution of a writ of seizure, must seize only the property of the defendant; that, in case of doubt, he is to pause and ascertain who is the owner; that, after being forewarned by a third person that the property is that of such person, and not of the defendant, if, on receiving a bond of indemnity from the creditor, he proceeds with the seizure, and it turns out that the property is not that of the defendant, he is liable in damages to the real owner, and that the jury are to take into consideration the manner in which the seizure was made, and the degree of rigor and roughness, or of lenity, with which the sheriff acted. This charge accords substantially with what we have just said on the subject, and the court did not err in so instructing the jury. The case relied on, *Pacific Ins. Co. v. Conard*, 1 Baldw. 140, appears to us to support the charge as given.

3. It is next urged, that the court erred in refusing a new trial on one of the grounds upon which it was asked, to wit, that the testimony admitted changed the nature of the action. We have already expressed our opinion, that the evidence was properly admitted, to show in what manner the deputy sheriff proceeded.

4. The fourth ground rests upon the assumption that there were more than one trespasser, and consequently, that all should have been joined in the action; and an exception to that effect was offered and rejected at a late period in the proceedings, and after an answer to the merits. The deputy sheriff was acting in that capacity, and consequently the sheriff was responsible for his acts, and they can not be considered as co-trespassers. But

even if it were otherwise, the exception not being a peremptory one, came too late.

Upon the whole, we see nothing which could justify our interference. The sheriff, instead of obeying his writ, followed the orders of the plaintiffs in the execution, disregarded the possession of the plaintiff, notwithstanding her urgent entreaties, and rigorously treated the property in her possession as that of the defendant in the execution. He must take the consequences of his illegal act, and look elsewhere for indemnity.

The judgment of the parish court is, therefore, affirmed, with costs.

SHERIFF IS LIABLE FOR MISCONDUCT OF HIS DEPUTY: *Hamard v. Israel*, 2 Am. Dec. 438; *Gorham v. Gale*, 17 Id. 549; *Forsythe v. Ellis*, 20 Id. 218; *Campbell v. Phelps*, 11 Id. 139; *Harrington v. Fuller*, 36 Id. 719.

NON-JOINDER, OBJECTION, WHEN AND HOW MADE: See *Mayor of New Orleans v. Ripley*, 25 Am. Dec. 175; *Robinson v. Smith*, 24 Id. 212; *Baker v. Jewell*, 4 Id. 162; *Le Page v. McCrea*, 19 Id. 469; *Hilliker v. Loop*, 26 Id. 226; *Jones v. Pitcher*, 24 Id. 716; *Robertson v. Smith*, 9 Id. 227; *Wheelwright v. Depeyster*, 3 Id. 345; *Gilbert v. Dickerson*, 22 Id. 592; *Bell v. Layman*, 15 Id. 83; *McLanahan v. Wyant*, 21 Id. 363; *Van Epps v. Van Deusen*, 25 Id. 516; *Marshall v. Jones*, Id. 260; *Reeves v. Dougherty*, 27 Id. 496; *Linton v. Gilliam*, 33 Id. 430; *Fogg v. Virgin*, 36 Id. 757; *Nash v. Skinner*, Id. 336; *Chick v. Trevett*, 37 Id. 68.

WADE v. NEW ORLEANS CANAL AND BANKING CO.

[8 ROBINSON, 140.]

IN ACTION ON BANK NOTES DESTROYED BY FIRE it is necessary to furnish very strong and conclusive evidence of the destruction.

WANT OF IDENTITY OF NOTES BY NUMBERS AND DATES is not a fatal defect in the evidence, when it is supplied by such strong concurrent circumstances as to leave no reasonable doubt of the fact alleged.

DESTRUCTION OF BANK NOTES BY FIRE DOES NOT DESTROY OBLIGATION of the bank to pay; every note it has put in circulation is, in contemplation of law, still due by the bank.

APPEAL from the district court of the first district. The opinion states the case.

O. M. Jones and L. Pierce, for the plaintiffs.

F. B. Conrad, for the appellants.

By Court, **BULLARD, J.** This is an action against the Canal Bank, in which the plaintiffs seek to recover two thousand and fifty dollars, the amount of twenty one hundred dollar notes, and one fifty-dollar note of the defendants, which, it is alleged,

were consumed by the fire which destroyed the dwelling-house and furniture of the plaintiffs, in the month of July, 1842. Judgment was rendered in the commercial court in favor of the plaintiffs, and the bank has appealed.

It is incumbent on the plaintiffs, in a case like the present, to furnish very strong and conclusive evidence of the destruction of the bank notes by fire. The only defect in the evidence is, the want of identity, by numbers and dates. Is that defect supplied by such strong concurrent circumstances as to leave no reasonable doubt of the fact alleged? If so, equity forbids that the bank should profit by the destruction of their notes, at the expense of the plaintiffs. It is clearly shown, that Mrs. Wade received, in March and April, 1842, from the Canal Bank, the amount claimed by her, on two checks, the one for one thousand dollars, and the other for one thousand and fifty dollars. It was paid to her in bank notes of the Canal Bank. When the run took place upon the bank, she endeavored to get the specie, but the teller told her the sum was so large she ought to wait till the next day. The next day, June 1, 1842, the bank suspended specie payments. She afterwards consulted an officer of the bank as to what she should do—whether she should part with her money at a discount, or keep it. The amount is shown to have been in her possession immediately preceding the fire. It was kept in her armoire in her sleeping room, together with some gold and silver and a gold watch, and was placed in a silver basin. After the fire a mass of melted silver and gold was recovered from the ashes immediately under the room, which was entirely destroyed with all the furniture, and Mrs. Wade narrowly escaped by mounting upon the roof of the house, and was much injured by the fire. The fire broke out in the kitchen, under the room in which Mrs. Wade slept with two children and some servants, about daylight in the morning. The whole house was consumed, together with all the furniture, except some in the parlor.

Mrs. Wade was very much injured, and was confined several weeks with her burns. As soon after the fire as her physicians would allow her to see visitors, she stated to a person who called on her, and who was examined as a witness, that she had lost all that she had; that she had lost a gold watch which belonged to her daughter; and she spoke of the two thousand and fifty dollars in notes of the Canal Bank, and other bank notes which had been consumed. The witness made a memorandum of what she had lost, and told her he had no doubt the bank would pay

her. Among the ashes was found not only gold and silver that was melted, but four hundred or five hundred dollars in specie, which was not melted, and that directly under the place where the plaintiff's sleeping room was situated. It is further shown, that there is yet in circulation of the same issue about sixteen thousand dollars in one hundred dollar notes, which were put in circulation by the bank, previously to the fire.

A critical examination of all the evidence given on the trial has not enabled us to detect a single circumstance tending to create any suspicion. It is quite conclusive, that the fire which consumed the house, destroyed the bank notes, as alleged in the petition, and that it is impossible they can ever be presented for payment to the bank. It would even have created suspicion, if the plaintiff had retained, and been prepared to prove by a witness, the numbers, letters, and dates of the identical bills kept by her in her armoire, and alleged to have been destroyed. Such precautions are quite unusual. Her retaining the notes so long is accounted for by the fact, that they were at that time at a heavy discount, and that she had been advised by an officer of the bank not to submit to a sacrifice. Three days before the fire, she had offered to lend the money for two or three months to be repaid in good money. The plaintiff was ruled to give bond, with surety, to indemnify the bank, in case it should appear hereafter that the notes were not destroyed; and this could only be shown by the fact, that when the old issue shall be called in, the whole shall be presented for payment. The bank is thus amply protected from any future loss.

The destruction of a bank note by fire, or otherwise, does not destroy the obligation of the bank to pay. Every note it has put in circulation is, in contemplation of law, still due by the bank. The difficulty consists in procuring such clear and satisfactory evidence of the loss, as to place the bank beyond the reach of ultimate loss or imposition. In the present case, the evidence leaves no doubt on our minds of the total destruction of the notes, as set forth in the petition.

Judgment affirmed.

ACTIONS ON LOST OR DESTROYED NOTES: See *Edwards v. McKee*, 13 Am. Dec. 474; *Ross v. Bank of Burlington*, 15 Id. 664; *Rowley v. Ball*, Id. 286; *Bank of United States v. S. J.*, 13 Id. 44; *Chaudron v. Hunt*, 20 Id. 60; *Brent v. Ervin*, 15 Id. 157; *Vassaken v. Hornbeck*, 25 Id. 509; *Blade v. Noland*, 27 Id. 128; *Reynolds v. French*, 30 Id. 456; *Wyman v. Rae*, 37 Id. 70; *Murdock v. Union Bank*, 38 Id. 22.

KEYES v. SHANNON.

[8 ROBINSON, 172.]

SURETY ON ATTACHMENT BONDS IS DISCHARGED BY INSOLVENCY of the defendant and an assignment over of his property for the benefit of his creditors.

JUDGMENT AGAINST SYNDIC DOES NOT BIND SURETY on attachment bond, as such a judgment only compels the syndic to place the claim on his tableau of distribution; and is different from a personal judgment of defendant, for the satisfaction of which the surety is bound.

LIABILITY OF SURETY ON ATTACHMENT BOND contemplates a personal judgment against the defendants in the suit; one that could have been satisfied out of the property attached, which the bond was intended to represent; and not a judgment against the defendants' syndic, as such judgment could not be so satisfied.

JUDGMENT AGAINST SYNDIC CAN NOT BE SATISFIED FROM PROPERTY ATTACHED in a suit brought before the failure, as such property must be considered as a part of the general fund, from which all the creditors are to be paid.

ATTACHMENT GIVES NO LIEN IN CASE OF THE DEFENDANT'S FAILURE.

APPEAL from the parish court of New Orleans. The opinion states the case.

Elmore and W. W. King, for the plaintiffs.

Benjamin, for the appellant.

By Court, MORPHY, J. A. McKeever is appellant from a judgment rendered against him, as surety of the defendants, on a bond signed by the latter to obtain the release of certain goods attached by the plaintiffs. This suit was begun by attachment in the commercial court of New Orleans, on the sixteenth of March, 1840. Some property was attached, which was released on the defendants' giving bond, with A. McKeever as their surety, on the twentieth of March, 1840. The condition of the bond was, that "if the defendants, Pierce Shannon and brother, should satisfy such judgment as might be rendered against them, the obligations should be void, or else should remain in full force." On the following day, on the twenty-first of March, 1840, the defendants filed their schedule in the probate court, and made a cession of their property, whereupon the judge made the usual order, directing a meeting of their creditors to be held, and all proceedings against the persons and property of the insolvents to be stayed. On the schedule, the debt sued for by the plaintiffs was admitted to be due. The suit of Keyes & Roberts was transferred from the commercial court to the parish court, and cumulated with the proceedings in insolvency. On

the fifteenth of November, 1841, the syndic's attorney filed a written consent, upon which judgment was entered up against the syndic, on the same day, for one hundred and sixty-six dollars and thirty-eight cents, with legal interest from the day of judicial demand.

Under these facts, it appears to us, that the court below erred in giving judgment against the surety on the bond. McKeever bound himself to satisfy such judgment as the plaintiffs might obtain against the defendants in the suit against Pierce Shannon & Brother. No such judgment was ever rendered against them, as they failed the very next day, and all proceedings against their persons and property were stayed. The event on which the surety undertook and bound himself to pay, has never happened. The judge below was of opinion, that the judgment against the syndic was the same thing as the judgment against the defendants in person. We can not so consider it. The debt for which suit had been brought by Keyes & Roberts being admitted, the judgment entered up by consent against the syndic, was an idle and useless proceeding. It only bound the syndic to place the claim on his tableau of distribution, when he should file one. This he could and would have done without this judgment, as the debt was undisputed. The thirty-fifth section of the act of 1817, which provides for the continuance of suits against the syndic, applies to claims which are contested, and which it is necessary to liquidate. The judgment rendered by consent against the syndic, after the defendants had failed, is not such a judgment as was contemplated by the parties to the bond. They had in view a personal judgment against the defendants in the suit; one that could have been satisfied out of the property attached, which the bond was intended to represent. Had the attachment not been dissolved, it is clear, that the property attached would not have been subject to satisfy this judgment rendered against the syndic, as the representative of the creditors of the insolvents. The property attached must have been considered as part of the general fund, from which all the creditors were to be paid. The plaintiffs had obtained no privilege on it, inasmuch as the defendants failed before any judgment was obtained: *Marr v. Lartigue*, 2 Mart. 98; *Harper v. Destrehan*, 12 Id. 32; *Fisher v. Vose*, 3 Rob. 461.

The bond of the defendants represents the property so far as the attaching creditors are concerned. If, under the judgment rendered against the syndic, they would have had no privilege on the property seized under their attachment, they can not have

any right on the bond, inasmuch as the property attached, and which was represented by the bond, has gone to the benefit of the mass of the creditors. They stand in the same situation as if the property had remained subject to their attachment. In the case of *Marr v. Lartigue*, 2 Mart. 98, wherein it was for the first time decided, that an attachment gives no lien in case of the defendant's failure, the superior court of the territory said: "Had the defendant relieved himself from the seizure, he would have given security to defend the suit and abide the judgment of the court. Could the penalty of the bond have been recovered, when afterwards, and before judgment, the proceedings were stayed, so that no judgment could be obtained, and the debt became by law, or the consent of the majority of the creditors, reduced in its amount, and payable out of a certain fund only?" The case then supposed by the court, is the very one now under consideration, and we concur in the opinion, that no recovery can be had, as no judgment was ever rendered against the defendants within the sense and meaning of the bond, and the contemplation of the parties to it.

It is, therefore, ordered, that the judgment of the parish court be reversed, and that ours be in favor of A. McKeever, the defendant in the rule, with costs in both courts.

ASSIGNMENT IN INSOLVENCY AFTER SUIT IS COMMENCED takes only the surplus after satisfying the complainant's debt: *Corning v. White*, 22 Am. Dec. 659; and see *Pike v. Bacon*, 38 Id. 259. An attachment lien is overreached by a decree in bankruptcy: *Fisher v. Vose*, 38 Id. 243.

STATE v. MCCOY.

[8 ROBINSON, 545.]

LENGTH, DEPTH, AND BREADTH OF WOUNDS NEED NOT BE STATED in an indictment for murder.

TERM "MORTAL" IS INDISPENSABLE IN DESCRIBING BRUISE OR WOUND in an indictment for murder, and when so described an adequate cause of death has been assigned, which will be supported by evidence of any deadly wound or bruise.

MURDER, AT COMMON LAW, consists of the stroke and consequent death.

VENUE IN INDICTMENT FOR MURDER where the stroke and the death occurred in different counties, was by the statute of 2 and 3 Edw. VI. in the county where the death took place; and when the death occurred out of the county, the statute of 2 Geo. II. provided that it should be tried in the county where the stroke happened.

OUR ACT OF 1805, INTRODUCING COMMON LAW IN CRIMINAL MATTERS, adopted the system as it existed at that time, modified, explained, and

perfected by statutory enactments, so far as those enactments are not found to be inconsistent with the peculiar character and genius of our government and institutions.

WHERE DEATH TOOK PLACE IN ANOTHER STATE, an indictment in the parish where the stroke was given is valid.

APPEAL from the district court of Pointe Coupée. The opinion states the case.

Preston, attorney general, for the state.

Boyle and Ratliff, for the appellants.

By Court, KING, J. The defendants, Jeremiah McCoy, Warren Covington, and John Pough, were indicted with Peter Cade, who does not appear to have been tried, for the murder of James Leonard Hornsby, in the parish of Pointe Coupée. The indictment alleges the mortal strokes to have been given in the parish of Pointe Coupée, in the state of Louisiana, on the twenty-sixth day of February, 1843, and the consequent death to have occurred in Adams county, in the state of Mississippi, on the fifteenth day of March following. The defendants were tried in the parish of Pointe Coupée, convicted, and sentenced by the court, each to a fine of one hundred dollars, and to suffer imprisonment, at hard labor, for the term of one year. From this judgment they have appealed, asking that it be reversed, and that they be finally discharged from the prosecution, for the following alleged errors apparent on the face of the record, viz.: "1. The indictment is vague and indefinite in not stating any distinct mortal wounds to have been given, on any distinct portion of the body of the deceased; nor is any wound, mortal or otherwise, described with the necessary legal averments of length, depth, and breadth; 2. From the language of the indictment, alleging that the divers wounds and bruises, and mortal wounds were inflicted in the parish of Pointe Coupée, and that the death of James Leonard Hornsby took place in Adams county, in the state of Mississippi, it is apparent that the court, *a qua*, had no jurisdiction of the case against the accused, and could proceed to pass no judgment on the verdict of the jury." These will be considered in their order.

It was formerly considered necessary, when the indictment alleged the death to have arisen from a wound which penetrated the skin, to describe its length, depth, and breadth, except when it passed through the body, or a limb was cut off, in order to show an adequate cause of death. It was otherwise, when the death was averred to have proceeded from a bruise, and it

was never required to prove either the wound or bruise as laid. It is now settled, that it is not necessary, in an indictment for murder, to state the length, breadth, or depth of the wounds. The term mortal is indispensable in describing the bruise or wound, and when so described, an adequate cause of death has been assigned, which will be supported by evidence of any deadly wound or bruise: Archb. Crim. Pl. 385; 6 Am. Com. L. 20. The indictment, in the present case, alleges "several mortal bruises and wounds in and upon the right side of the head, also in and upon the stomach, back, and sides," which is a sufficiently distinct description both of their character and locality, and conforms with the most approved precedents: Archb. 406.

The solution of the second question presented, depends upon the interpretation to be given to the act of 1805, which introduced the common law in all criminal matters. This statute enacts: "That all the crimes, offenses, and misdemeanors therein named (of which murder is one) shall be taken, intended, and construed according to and in conformity with the common law of England; and the forms of indictment (divested, however, of unnecessary prolixity) the method of trial, the rules of evidence, and all other proceedings whatsoever, in the prosecution of the said crimes, offenses, and misdemeanors, changing what ought to be changed, shall be, except as is by this act otherwise provided for, according to the said common law." At common law, murder (a technical term which we have adopted, of known and settled meaning) consists of the stroke and the consequent death. The concurrence of both being necessary for the consummation of the crime, when they occurred in different counties, the offense was incomplete in either: 1 East, 261. Hence doubts were entertained in relation to the proper venue in such cases. Both Hale and Hawkins say, that it was considered doubtful by some, whether the crime could be prosecuted in either county, but that the more common opinion was, that it could be inquired of in the county where the stroke was given: 1 Hale, 426; 1 Hawk. 31, sec. 13. To remove this doubt, and prevent a failure of justice, the act of 2 and 3 Edw. VI. was passed, which established the venue in such cases, in the county where the death took place: 1 East, 361.

We concur with the counsel in believing that the legislature, in adopting the common law rules of proceeding, method of trial, etc., adopted the system as it existed in 1805, modified, explained, and perfected by statutory enactments so far as those

enactments are not found to be inconsistent with the peculiar character and genius of our government and institutions. It will not be contended that those principles and rules of the common law, which had been abrogated and had ceased to exist in England, previously to 1805, were introduced by our statute. On the other hand, the system would have been incomplete and inefficient for the purposes contemplated by the legislature, if they had not adopted the substitutes established by parliament, for the rules of the common law which had been abolished. If this interpretation be incorrect, the legislature have been guilty of the absurdity of enacting laws for the protection of life and property, without furnishing the means of bringing offenders to justice. We must presume, that it was intended to give effect to those laws, and to provide means for their enforcement, adequate to the ends which were in view. With this construction of our act it may be considered, that by the statute of 2 and 3 Edw. VI., which is amendatory of the common law, it is as fully and definitively settled in this state, as though such a provision had been made by special legislative enactment, that the venue in such cases, is in the parish where the death occurred.

It is then urged, that the venue being thus established, the indictment in the parish where the stroke was given, was erroneous. The answer is, that the cases are not analogous. The death has occurred, not in different parishes of the same state, but in a different state of the union, as separate and distinct from Louisiana, for all the purposes of internal police and the punishment of violations of its penal laws, as Great Britain is from France; and we find that such cases are not unprovided for by the system which we have borrowed. At common law, it was doubtful, whether the killing of one who died in England, of a blow received in foreign parts, and *vice versa*, could have been inquired of. Here again parliament interposed, and put the question to rest, by passing the statute of 2 Geo. II., which provides that, "when the stroke has been given in England, and the death occurs out of England, or the reverse, that the killing may be inquired of in that part of England where either the death or stroke shall happen respectively:" 1 East's P. O. 366. The same reasons which have been urged for adopting the statute of Edw. VI., as part of our law in relation to venue, apply with equal force to the statute of Geo. II. Both were passed for the purpose of explaining the common law, or of providing rules for the prosecution of criminals, in lieu of those which had grown into disuse, or which had been for-

gotten or become doubtful, or which experience had taught to be inconvenient or ineffectual. Under this statute the accused were properly indicted in the parish of Pointe Coupée.

An application was made to the district court for a new trial, upon the ground that the verdict was contrary to the law and the evidence; and further, that the judge erred in charging the jury, "that John Pough and Warren Covington, who were proved to have been hired by Peter Cade to cut wood for him, and lived and were domiciliated in his house, could not be considered as his servants, nor in a capacity which brought it within the provisions of the common law, so as to defend the person or property of their employer." No exception was taken to the charge of the judge, at the time it was given to the jury. Nor does it appear from the record, that instructions were asked upon this point; nor, in a shape which would authorize us to review it, that such a charge as that stated in the motion, was delivered.

There can be no doubt that the relation of master and servant may exist in this state, as at common law, with all the reciprocal obligations which grow out of that relation. It does not arise, however, from every contract by which an artificer and mechanic, or daily laborer, is temporarily employed to execute a specific piece of work, or to perform a specific service. The question is not presented in a form which renders it necessary, for the decision of the present case, to pursue inquiry upon this subject further.

Judgment affirmed.

DESCRIPTION OF WOUND IN INDICTMENT FOR MURDER: See *State v. Owen*, 4 Am. Dec. 571; *State v. Fley*, Id. 583; *White v. Commonwealth*, 6 Id. 443; *Territory v. McFarlane*, 5 Id. 706; *People v. Enoch*, 27 Id. 197; *State v. Orank*, 23 Id. 117.

VENUE.—Venue must be laid in the county wherein the offense was committed: *People v. Mather*, 21 Am. Dec. 122. Change of venue in criminal cases is discretionary: *Whiting v. State*, 38 Id. 499; and see *Summer v. State*, Id. 561; *Commonwealth v. Call*, 32 Id. 284.

STATE v. HORNSBY.

[8 ROBINSON, 554.]

NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE should not be granted unless the testimony appears to be such as would probably produce a different verdict.

MISPELLING OF WORD IN INDICTMENT does not render it invalid when the word is not changed into one of different signification, or where the word misspelled is surplusage merely.

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JURIES SHOULD NOT BE PERMITTED TO SEPARATE IN CAPITAL CASES, after they have been sworn, either with or without the consent of the prisoner. **MISCONDUCT AND ABUSE WILL ALWAYS BE PRESUMED** upon a separation of the jury in a capital case.

CONSTITUTIONAL PROVISION GIVING ACCUSED RIGHT OF "HAVING COMPULSORY PROCESS for obtaining witnesses in his favor" simply means to say that the accused shall not be debarred the right of issuing subpoenas for his witnesses as in civil cases.

COMPULSORY PROCESS TO COMPEL THE ATTENDANCE OF WITNESSES can only be exercised when the witness resides or is found within the district.

APPEAL from the criminal court of the first district. The opinion states the case.

Preston, attorney general, for the state.

Collens, Preaux, and Soulé, for the appellant.

By Court, NICHOLLS, J. An appeal has been taken from the judgment of the criminal court of New Orleans, pronounced upon the verdict of the jury, who found the accused guilty of manslaughter. A motion for a new trial, and also a motion in arrest of judgment, were both made in the inferior court, by the prisoner, and overruled. The correctness of the opinion of the court *a qua*, upon these two motions, forms the subject of this appeal. A new trial was urged, upon two grounds: 1. Because the verdict was contrary to law and evidence. 2. On account of the discovery of new testimony since the trial. The judgment was sought to be arrested, on the following grounds: "1. That the indictment is not wholly in the English language, as required by the laws and constitution of the state, and said indictment is wholly unmeaning, void, and illegal. 2. That there is no intelligible or sufficient description of the means of death, or any mortal wound or blow. 3. That the length and breadth of the wound alleged to have been mortal is not set forth in the indictment, as required by law, nor does it in any other manner appear from the indictment that the wound given was sufficient to cause the death. 4. That during the adjournment of the court from day to day, and while the trial was proceeding, the jury was allowed repeatedly to separate and go to their homes and business, instead of being kept together, under the sheriff's charge, during the said adjournment, as the law absolutely requires, for the purpose of preventing undue prejudices and influences from reaching the jury and determining the verdict, as actually happened in this case."

Were the court to confine its examination to those points alone upon which its judgment is based, the fourth reason which was

assigned why the judgment should be arrested, would be sufficient for that purpose; but believing it important for the proper administration of the criminal law of the state, that all doubtful points should be elucidated and finally settled whenever practicable, so as to furnish a proper guide for the inferior tribunals, the various reasons assigned for the reversal of the judgment will be examined, and in the order in which they are presented by the record. And first, as it regards the affidavit of the discovery of new testimony. This court has already said, in the case of *The State v. Clark*, 8 Rob. 533, that it is not sufficient to warrant the granting of a new trial, that the newly discovered evidence might have the effect of throwing a shade of doubt over some of the incidental circumstances of the trial; it should appear to be of so decided a character, that if admitted, it would give an acquitting complexion to the case. This opinion, the court believes, establishes the true doctrine; in other words, the testimony should appear to the court to be such as might probably produce a different verdict, to justify the court in sustaining the motion. Whether the affidavit in the present case comes within the rule here laid down, is not necessary to decide. The four grounds urged in arrest of judgment will be examined *seriatim*, and in their order.

The argument of the counsel for the prisoner informs the court, that the indictment is not wholly in the English language, in this, that the word *extravasion*, which forms a part of the description of the cause whence death ensued, is not an English word, and consequently that the indictment is not in the language required by the constitution. The court believes that this strictness would not be required in an English court, nor by an English judge. In 1 Chit. 141 (Riley's ed. 1819), it is stated, that this strictness does not so far prevail as to render an indictment invalid, in consequence of the omission of a letter, which does not change the word into another of a different signification, as *undertood* for *understood*, and *recevd* for *received*. It is also laid down, that every indictment must charge with such certainty and precision, that it may be understood by every one. Now if it be admitted that there is no such word in the English language as *extravasion*, neither is there any such word as *undertood*, which latter word in England was considered amply sufficient and explicit, and sufficiently precise to be understood by every one, and therefore that the prisoner should not be permitted to pretend ignorance of what every one else understood. If the prisoner in the present case complain, that

he does not understand the word extravasion, neither would he have understood the word extravasation (the word intended to be used, as admitted in the argument), if that word had been used, and which would have been unobjectionable. Comprehending the word extravasation, therefore, which he would have been bound to do had it been found in the indictment, it is difficult to conceive how he could have been bewildered by the substitution of the word extravasion. Knowledge of the genuine word would have furnished an unerring guide to the meaning of the substitute. The charge, however, is properly laid in the indictment, if the objectionable word were entirely omitted, as surplusage, which the court was authorized to do: *Vide State v. McCoy et al.*, decided by this court at its last term [*ante*, 301]. Formerly, in England, the judges felt themselves constrained to adhere so strictly to form, that public justice was in many cases evaded, and the most dangerous malefactors let loose upon society, in consequence of the omission of some senseless and unmeaning form. The failure on the part of the prosecution to dot an i, or to cross a t, or something equally absurd, was considered sufficiently fatal to vitiate the whole proceedings. Substance was sacrificed to form, or rather form became substance, and substance mere form. A more correct and just appreciation of criminal justice has banished from the English courts these legal absurdities, which answered no other purpose than to protect and screen the guilty from the just punishment of their crimes. They will no longer permit the guilty man to escape punishment by averring that he can not comprehend, and does not understand, what is palpable and evident to the common sense of everybody else. True, these modern changes may not have the binding force of law in Louisiana; still it is believed that the principles of justice should and must be the same everywhere, and should be carried out upon all occasions, when not prohibited by positive legal enactment. Without inquiring whence the English courts and English judges derive authority for these wise, salutary, and indispensable changes, that authority was undeniably confided to the courts of criminal jurisdiction in Louisiana, by the act of 1805, introducing the common law of England; this train of reasoning is applicable to, and disposes of, the first, second, and third reasons filed in arrest of judgment. *Vide*, for the description of the wound, *The State v. McCoy et al.*, already referred to [*ante*, 301].

The separation of the jury, this court is of opinion, is fatal to the regularity of the proceedings of the court below, and en-

titles the accused to relief. This ground not being apparent upon the record when the motion was made, offered no cause to arrest the judgment; but the fact that the jury did separate, being shown to this court now, by the transcript filed and proceedings had in the lower court, will be examined as if offered on the motion for a new trial, which was the proper course. The decisions upon this point, both in the United States and in England, have been various and contradictory. In early times, the rule was unbending, that the separation of the jury was fatal to their verdict, and in cases where the court was obliged, *ex necessitate*, to adjourn, the jury was placed in charge of a bailiff, who was sworn to keep them together: *The King v. Stone*, 6 T. R. 530. In modern times, the rigor of this rule has, in many instances, been relaxed; but the decisions are so contradictory and conflicting that the question may still be fairly considered unsettled. Thus in Virginia the old rule prevails, and a separation of the jury is fatal to their verdict. In North Carolina the decisions are both ways: *State v. Garrigues*, 1 Hayw. 241; *State v. Carstaphen*, 2 Id. 238. So in New York, in *McLeod's Case*, as reported by Gould, p. 16, the court directed the sheriff to provide lodgings and places to take their meals for the jury, as it would be necessary to keep them together during the whole of the trial, and to provide them with accommodations as near the court as possible: *Graham on New Trials*, 91 *et seq.*; 1 Chit. 628; *Rosc. Crim. Ev.* 178. *Aliter* in Kentucky. The point appearing thus unsettled and *sub lite*, this court feels itself authorized to give a preference, and to adopt that rule which seems to offer the greatest security to the accused, and, at the same time, trenches in no wise upon any right necessary to insure the due and proper execution of the law.

In capital cases, the jury should not be permitted to separate after they have been sworn, either with or without the consent of the prisoner. This rigor, which the court conceives to have been the universal practice in the country parishes, can lead to no bad consequences. This precaution is necessary to protect the accused from any undue influence which may be exercised upon the members of the jury, even without their knowledge, and can not be tortured into a disparagement of their integrity. Improper impressions may and will be made upon their minds by artful and designing men, of which they may be perfectly unconscious; neither can they shut their ears to the expression of popular opinion; and as well might the administration of the juror's oath be considered as conveying a doubt

of his integrity, as this temporary seclusion from intercourse with the community at large. In cases not capital, courts may, in their discretion, permit the jury to disperse until after they have received the charge of the court; but they should not be permitted to separate after the charge has been given. In these cases, misconduct on the part of the jury will set aside their verdict; in capital cases, upon a separation, misconduct and abuse will always be presumed.

One other question still remains to be examined, viz., the extent of the right guaranteed to the accused by article 6, section 18, of the constitution of the state. The section reads as follows: "In all criminal prosecutions the accused shall have the right of being heard, by himself or counsel, of demanding the nature and cause of the accusation against him, of meeting the witnesses face to face; of having compulsory process for obtaining witnesses in his favor," etc. In the present organization of our courts having criminal jurisdiction, no power is given to them to coerce the personal attendance of witnesses except within restricted territorial limits. The process of no court of original criminal jurisdiction is co-extensive with the state. No statutory provision clothes the criminal court of New Orleans (*exempli gratia*) with authority to coerce the personal attendance of Kelly, the witness in this case, who resides in Bayou Sara; and yet this constitutional provision, at first blush, would seem to confer a right upon the accused of which the legislature could not deprive him, by making him amenable to the jurisdiction of a court, inefficient, from want of authority, to enforce this constitutional enactment; but to a proper understanding of this article in the constitution, it is necessary to revert to the cause and origin of the principle thus consecrated, not only in our own constitution, but in that of the United States, and of many of our sister states. It should be remembered, that this right was in former times, in England, withheld from the accused; not only were they denied the right of issuing process for their witnesses, but the witnesses (if present) were not permitted to be sworn; the right was at length extorted from the government by the people, and considered at the time an extraordinary concession, not a privilege or absolute right. Our forefathers, recurring to the time when the people had no such right, and the difficulty with which it was wrested from the government, incorporated the principle into the constitution, and made it a part of the fundamental law of the land, whence it has been copied into most of the constitutions of the states. Thus explained, it simply means to say, that the accused

shall not be debarred the right of issuing subpoenas for his witnesses, as in civil cases. Such is the construction given to a similar provision of the constitution of the United States. It is merely the enunciation of a principle, which to us, in the enjoyment of all the rights of freemen, may otherwise appear uncalled for, preposterous, and too plain a proposition to require insertion in the constitution. With equal propriety might it be said that the right secured to the accused, in the same article, of being heard by himself or counsel, and the exemption from being compelled to give evidence against himself, as also the prohibition upon the legislature of passing *ex post facto* laws, or laws impairing the obligation of contracts, in the following section, were likewise principles too plain to require a constitutional recognition; and yet, there they are to be found, and will probably find a place in the new as well as in the present constitution.

This view of the article in our constitution is most ably illustrated by Chief Justice Spencer in the construction given by him to the words, "nor shall any person be subject for the same offense, to be twice put in jeopardy of life or limb," contained in the fifth article of the amendments to the constitution of the United States. "The expression," jeopardy of limb, says this enlightened jurist, "was used in reference to the nature of the offense, and not to designate the punishment of an offense, for no such punishment as loss of limb was inflicted by the laws of any of the states, at the adoption of the constitution. Punishment by the deprivation of the limbs of the offender, would be abhorrent to the feelings and opinions of the enlightened age in which the constitution was adopted, and it had grown into disuse in England for a long period antecedently. We must understand the terms, jeopardy of limb, as referring to offenses which, in former ages, were punishable by dismemberment, and as intending to comprise the crimes denominated felonies. The question then recurs, what is the meaning of the rule, that no person shall be subject, for the same offense, to be twice put in jeopardy of life and limb. Upon the fullest consideration, which I have been able to bestow on this subject, I am satisfied it means no more than this: that no man shall be tried twice for the same offense. Should it be said, that we can scarcely conceive that a principle so universally acknowledged, and so interwoven in our institutions, should need an explicit and solemn recognition in the fundamental principles of the government of the United States, we need recur only to the history of that

period, and to some other of the amendments, in proof of the assertion, that there existed such a jealousy or extreme caution on the part of the state governments, as to require an explicit avowal in that instrument, of some of the plainest and best established principles in relation to the rights of the citizens and the rules of common law; the first article of the amendments prohibits congress from making any law respecting an establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition government for a redress of grievances; the second secures the right of the people to bear arms; and indeed without going into them minutely, nearly all the amendments of that instrument indicate either great caution in defining the powers of the national government, and the rights of the people and the states, or they evince a jealousy and apprehension that their fundamental rights might be impugned, so as to leave no doubt, that in the article under consideration, no new principle was intended to be introduced." *People v. Goodwin*, 1 Wheeler's Crim. Cas. 470 *et seq.*

This lucid exposition; given by Chief Justice Spencer, of the fifth article of the amendments to the constitution of the United States, furnishes a convincing and satisfactory key by which the eighteenth section, sixth article, of the Louisiana constitution may be opened to our examination, and its true intent and meaning eviscerated and established; and if the authority of his name were permitted in this instance, by northern abolitionists to exercise the same influence, and to be entitled to the same respect and weight, as is conceded to it by all others, it would put to rest all cavil upon the meaning of the words "the right of the people peaceably to assemble and to petition," etc., in the first article of the amendments to the constitution of the United States.

Putting out of view, the question whether the existence of slaves in a sister state be a grievance against which they have a right to petition or not, it merely recognizes, if Judge Spencer's doctrines and reasoning be correct, the right of the people to assemble and petition; a right, to be sure, which we can scarcely imagine could ever have been denied or called in question, did we not know, that this was the grievance of which they complained in England, where their peaceable assemblies were dispersed, by order of government (after reading the riot act), at the point of the bayonet. The people here, therefore (as they could have done, if no such constitutional provision existed), may peaceably

assemble, and petition congress, without let or hindrance; without having before their eyes the fear of soldiery, or their ears offended by the reading of riot acts, etc., leaving to the government afterward to make such disposition of their petitions, and to take such action, as to it may appear meet and proper. The right to assemble and petition circumscribes and comprises all that is recognized and all that was intended to be guaranteed to the people. Carrying out the views of Judge Spencer, and giving to his reasoning a fair and *bona fide* application, this would be its legitimate interpretation, securing to the people the right to assemble and petition, and neither purporting nor intending any enactment restrictive of the power of government to make any disposition it pleased, of the petitions when presented.

From this view we deduce, that the courts of criminal jurisdiction, not being vested with power beyond a certain prescribed and defined limit, compulsory process can not issue beyond said limit; that the accused has an undoubted right under the constitution, to have his witnesses heard, whether they be found within or beyond said limits; that the provision of the constitution allowing the accused to be confronted with the witnesses against him, is a personal privilege which he may waive; that being entitled to a speedy trial and to compulsory process to enforce the attendance of his witnesses, this latter right can only be exercised when the witness resides or is found within the district; that the legislature having failed to provide means to coerce the personal attendance of the witnesses, it follows as a necessary corollary, that recourse must be had to the ordinary and only remaining method of procuring testimony, viz., by commission.

Wherefore it is ordered, that the judgment of the criminal court be set aside, canceled, and annulled; that a new trial be granted; and that the said criminal court conform to the principles herein established, upon the trial and prosecution of the appellant, Leonard C. Hornsby.

NEWLY DISCOVERED EVIDENCE A GROUND FOR NEW TRIAL: See *Landry v. Bangnon*, 36 Am. Dec. 606; *Schlenker v. Risley*, 38 Id. 100; *Perrin v. Protection Ins. Co.*, Id. 728; the notes to these cases refer to the previously reported cases in this series on this subject.

SEPARATION OR DISCHARGE OF JURY IN CRIMINAL CASE BEFORE CONVICTION.—The separation of a jury in a criminal case will vitiate a verdict of conviction: *McLain v. State*, 31 Am. Dec. 573; and the discharge of a jury in such a case, without legal justification for the act, entitles the prisoner to a discharge as if acquitted: *Mahala v. State*, Id. 591; and see *People v. Olcott*, 1 Id. 168; *State v. Woodruff*, 2 Id. 122; *People v. Barrett*, Id. 239; *People*

v. *Goodwin*, 9 Id. 203; *Nomaque v. People*, 12 Id. 157; *State v. Burket*, Id. 662; *State v. Moor*, Id. 541; *Commonwealth v. Purchase*, 13 Id. 452; *State v. McKee*, 21 Id. 499; *Hector v. State*, 22 Id. 454; *Nugent v. State*, 24 Id. 746; *Commonwealth v. Cook*, 9 Id. 465.

MISCONDUCT OF JURY AS GROUND FOR NEW TRIAL: See note to *Hilton v. Southwick*, 35 Am. Dec. 253, where this subject is discussed.

This case came up before the supreme court again: See *post*.

STATE v. HORNSBY.

[8 ROBINSON, 533.]

LEGAL IMPORT OF TERM AUTREFOIS ACQUIT is that it is a plea made by a defendant, indicted for a crime or misdemeanor, that he has been formerly tried and acquitted of the same offense.

TO SUSTAIN A PLEA OF AUTREFOIS ACQUIT, a legal acquittal, by judgment, upon trial, by verdict of a petit jury, must be shown.

NEW TRIALS IN CAPITAL CASES.—All judges who are empowered to hear and determine indictments for crime, are invested with a discretionary power to grant new trials in capital cases, as well as in those of misdemeanor, where upon a sufficient showing, touching the merits or irregularities in the proceedings, justice and humanity demand it.

NEW TRIAL IS A REHEARING OF THE CASE before another jury, but with as little prejudice to either party as if it had never been heard. It places the case exactly in the position it occupied before there had been a trial, and the party stands as if he had never been tried.

NOLLE PROSEQUI ENTERED ON INDICTMENT FOR MURDER then pending, does not acquit the accused, when another indictment is instantly instituted for manslaughter.

IDEM—WHERE UNDER INDICTMENT FOR MURDER, ACCUSED IS CONVICTED OF MANSLAUGHTER, and on appeal a new trial is granted, the attorney general may enter a *nolle prosequi* on the indictment for murder, and institute another for manslaughter without acquitting the accused.

PARTY CONVICTED OF MANSLAUGHTER ON INDICTMENT FOR MURDER can not be again indicted for the same murder.

NOLLE PROSEQUI DOES NOT AMOUNT TO AN ACQUITTAL nor to a pardon, but is simply a discharge of a particular indictment upon which it is entered, and is no bar to a future indictment for the same offense.

ATTORNEY MAY ENTER NOLLE PROSEQUI AT PLEASURE, before the jury is impaneled, and without the consent of the court or accused, and not run counter to the fifth article to the amendments of the constitution of the United States.

APPEAL FROM PRELIMINARY DECISION OR INTERLOCUTORY ORDER OF CRIMINAL COURT will be dismissed on motion, as the right of appeal only accrues after verdict and judgment and sentence.

APPEAL from the criminal court of the first district. The opinion states the case.

Preston, attorney general, for the state.

Collens, Preaux, and Soulé, for the appellants.

By Court, JOHNSON, J. On the seventh of March, 1844, the defendant was indicted for the crime of murder, and found guilty of manslaughter. His counsel moved in arrest of judgment and for a new trial, on various grounds, which were overruled by the judge of the criminal court, and an appeal was prosecuted to this court. On the hearing here, a new trial, for irregularities in the proceedings below, was ordered, and the case remanded for that purpose: 8 Rob. 554 [*ante* 305]. On the twenty-first of November, 1844, the attorney general preferred a new indictment against the accused for manslaughter, and on the same day, with leave of the court, on motion, a *nolle prosequi* was entered upon the indictment for murder. On the sixteenth of December, 1844, the accused having been brought to the bar for an arraignment on this new indictment, interposed the following plea, to wit:

"The accused, Leonard C. Hornsby, being arraigned on the indictment charging him with the manslaughter of Daniel H. Twogood, pleads *autrefois acquit*; and also pleads, that he has heretofore, on a former indictment, been put in jeopardy of life and limb for the same offense herein charged, and that this prosecution is thereby barred and should be abated, agreeably to the principles of the constitution of the United States, and of the government and laws of Louisiana.

"And this defendant further shows, that on the seventh day of March, 1844, an indictment in legal form and valid in law, was filed against him in the court, charging the defendant with the murder of said Daniel H. Twogood; that this defendant was arraigned thereon on the twelfth day of March, A. D. 1844, and having pleaded 'not guilty,' was tried thereon, and at the termination of the said trial, on the twenty-second day of March, 1844, the jury sworn in said case, returned a verdict as follows: 'Guilty of manslaughter, New Orleans, twenty-second March, 1844, Francis L. Crais, foreman,' upon which, sentence and judgment were passed upon this defendant, on the twentieth day of June, 1844, condemning this defendant to five years' imprisonment at hard labor, to pay a fine of fifty dollars and the costs of the prosecution; that upon appeal from said judgment and sentence before the court of errors and appeals in criminal matters, the said judgment and sentence were, on the eleventh day of July, 1844, set aside, canceled, and annulled, and the case remanded for a new trial; that, on the twenty-first day of November, 1844, a *nolle prosequi* was entered upon said indictment for mur-

der, on motion of the attorney general, which motion was allowed by the court. And this defendant, for greater certainty, annexes hereunto, as a part of this plea and answer, a certified copy of the said previous plea and answer, and a certified copy of the said previous indictment for the murder of Daniel H. Two-good, in order that its identity with the present prosecution may fully and clearly appear, and in order that the court may see with greater certainty that this defendant is actually charged with the same offense charged in said indictment for murder.

"That this defendant will show from the records of this court, and of the said court of appeals: 1. That the proceedings above alleged, amount in law and equity, to an acquittal of the crime herein alleged. 2. That said proceedings are a perpetual bar to the present prosecution."

To this plea the attorney general demurred, alleging for cause, that the facts set forth in said plea, are insufficient in point of law to substantiate said plea and bar the present prosecution; on which he prayed the judgment of the court—that said plea of *autrefois acquit* be overruled and rejected, and the defendant tried on the indictment found against him.

Subsequently the defendant filed the following additional pleas, to wit: "In this case the defendant, for greater certainty and without waiving any of the exceptions contained in his pleas to the indictment in this case, sets forth, that he relies upon the following points comprehended in said pleas: 1. Upon the verdict rendered by the jury on the former indictment, and recited in this defendant's plea and answer. 2. Upon the fifth article of the amendments to the constitution of the United States, which declares that 'no person shall be subject for the same offense, to be twice put in jeopardy of life or limb,' said article being of binding force upon the courts of this and the other states of the union. 3. Upon the thirty-third section of the acts of the territorial legislature, approved May the 4th, 1805."

Under the mixed aspect of these pleas, the necessity is imposed on us, to consider, what is no longer a novelty but a very plain matter, and that is the legal import of the term *autrefois acquit*. It is a plea made by a defendant indicted for a crime or misdemeanor, that he has been formerly tried and acquitted of the same offense. To be a bar the acquittal must have been by trial, and by the verdict of a jury, on a valid indictment: 1 Bouvier, 109. To render the plea of a former acquittal a bar, it must be a legal acquittal by judgment upon trial, by a verdict of petit jury: 1 Chit. 458. These authorities prove clearly, that

a legal acquittal by judgment, upon trial, by verdict of a petit jury, must be shown, to sustain the plea of *autrefois acquit*, and bar the proceedings.

The argument for the accused did not appear directly to question the truth of this doctrine, nor was a technical defense of *autrefois acquit* in so many words, insisted upon; but it was urged, that the new trial granted in the case of murder wherein a verdict of manslaughter had been rendered, and the subsequent quashing of the indictment for murder, amount, in judgment of law, to an acquittal. In taking this ground, the opinion of Judge Story in *United States v. Gibert*, 2 Sumn. 37, seems chiefly to have been relied upon. It is there asserted, that a new trial can not be granted in a capital case, because it would operate an acquittal of the accused, upon the common law maxim and constitutional provision that "no person shall be subject, for the same offense, to be twice put in jeopardy of life and limb," which is now well understood to mean no more than that a man shall not be tried twice for the same offense. In England there is no doubt, in case of treason or felony, that a new trial can not be granted when the proceedings have been regular; but if the conviction appears to be unjust to the judge, he may respite the execution, to enable the defendant to apply for a pardon, but this court has decided, in consonance, as it thinks, with the great current of American decisions, that all judges who are empowered to hear and determine indictments for crime, are invested with a discretionary power to grant new trials in capital cases as well as in those of misdemeanor, where, upon a sufficient showing, touching the merits or irregularities in the proceedings, justice and humanity demand it.

In the case of *The State v. Hornsby*, 8 Rob. 554 [*ante*, 305], we recognized this merciful principle, when, in awarding him a new trial, we decreed that, "in capital cases, upon a separation of the jury, misconduct and abuse will always be presumed." We can not, therefore, in this instance, give to the opinion of Judge Story, however eminent as a jurist he may be, the weight of authority. In the case in which it was delivered, it did not acquire the force of authority, since the other judge (Davis) differed in opinion with Judge Story on the point; and we are yet to be informed whether it has succeeded in making many converts anywhere. The learned reasoning of Judge Story led the prisoners on to execution upon the gallows, to prevent their lives from being twice put in jeopardy, thus torturing a humane constitutional provision in their favor, into one of hopeless and

inevitable death, no matter how unjust and grievous the sentence of conviction. In the case of *The Commonwealth v. Green*, 17 Mass. 515, 533, Judge Parker said, "the court had authority to grant a new trial after conviction of a capital crime." In *The People v. Townsend*, 1 Johns. Cas. 104, a new trial was granted, in a case of perjury, because the verdict of the jury was contrary to evidence. See also the same principle acknowledged in *The People v. McKay*, 18 Johns. 212. Indeed we do not regard this question as at all open to controversy, and have given to it more consideration than it merited, and more, it may be, than was expected of us. We have, therefore, no doubt of our authority to grant, and of the defendant's right to demand, the new trial which was awarded him on the former appeal. Let us now inquire into the legal effect of that new trial, in view both of the rights of the accused and those of the state. What is a new trial? "It is a rehearing of the case before another jury; but with as little prejudice to either party as if it had never been heard before. No advantage is to be taken of the former verdict on the one side, or the rule of court, for awarding such second trial on the other:" 3 Bl. Com. 391. A new trial results then, in placing the case exactly in the position it occupied before there had been a trial, in relation to the objects for which it had been awarded, and, with this qualification, all proceedings are set aside and the party stands as if he had never been tried; and when this court, on the former appeal, ordered, that "the judgment of the criminal court be set aside, canceled, and reversed," the defendant stood again before that court as he stood before the trial—unprejudiced and in the full possession of all his rights, just as they existed when he first answered to the indictment. But the new trial conferred on him no new rights.

It is not disputed that the new trial was awarded at the prayer of the defendant; and, as we think, in accordance with settled doctrine; yet it has been argued that, in seeking and obtaining the new trial, the defendant did not, by legal intentment, consent to be tried on any other than the first indictment, the quashing of which, under the circumstances, was, it is said, equivalent to an acquittal. Upon the maturest reflection, we think that no such pretension can be legitimately set up by the defendant. He took the new trial with all its legal consequences and contingencies; and if the attorney general, anterior to the first trial or to the impaneling of a jury for the purpose of a trial, could have entered, as we doubt not he could, a *nolle*

prosequi on the indictment which was then pending for murder, and institute another instantly for manslaughter, without thereby acquitting the accused by judgment of law, he certainly had an equal right to adopt that course after the new trial was awarded, at the time he did exercise it with the leave of the court. All former proceedings were set aside, and the party stood as if he had not been tried at all. It is true, the verdict of manslaughter was a virtual acquittal of the charge of murder, for which grade of homicide the accused could not have been again constitutionally put on his trial under the first indictment or a second; yet it would be a legal solecism to say he was acquitted of the manslaughter, when he was convicted of that offense by the finding of the jury, which was an insuperable barrier to a verdict for murder only, on a second trial—the new trial having been granted in reference to the fact whether the homicide was manslaughter or not. In other words, the new trial was granted as to the crime of which the accused was found guilty, the indictment affording only the form of bringing the crime before the court. The homicide was always the same in fact. It was pronounced manslaughter by the jury. The accused succeeded in setting that verdict aside, to be tried again for the same fact. It was the fact, and not the form of bringing it before the court, which the accused succeeded in having ordered to be tried again, and the fact is now brought before the court in a form most favorable to the accused. It is a rule of law, that if a man indicted for murder is found guilty of manslaughter, he can not again be indicted for murder, if the first indictment were a good one; and if, in such a case, a new trial is awarded, it may be on the indictment for murder, because an indictment for murder includes an accusation of manslaughter. We can see, however, no legal reason, why, in a case like the present, the attorney general might not enter a *nolle prosequi* on the indictment for murder, on the trial of which, manslaughter was the verdict, and a new trial granted, and prefer one simultaneously for the manslaughter. It neither compromises, delays, nor takes away from the accused, any right or privilege, whilst it simplifies the prosecution.

These matters disposed of in this manner, we are to inquire into the effect of the *nolle prosequi*, and of the right of the attorney general to enter it in this case. The effect of a *nolle prosequi*, when obtained is to put the defendant without day; but it does not at all operate as an acquittal, for he may afterwards be re-indicted, and, even upon the same indictment, fresh process may

be awarded: 1 Chit. 470, 480. A *nolle prosequi* neither amounts to an acquittal nor to a pardon, but is simply a discharge of a particular indictment upon which it is entered, and is no bar to a future indictment for the same offense: *Commonwealth v. Wheeler*, 2 Mass. 172; *Commonwealth v. Briggs*, 7 Pick. 179.

A *nolle prosequi* is now held to be no bar to a future action for the same cause: 2 Bouvier, 103. To this point, these authorities we think ample. Now as to the right of the attorney general to enter a *nolle prosequi*, as to the indictment for murder, and to prefer the one for manslaughter. After much investigation in the case of *The State v. Brown*, decided by this court, 8 Rob. 566, we held that "the attorney general may at any time before a defendant has been actually tried, on application to the court, have an indictment quashed, if the prosecution is in good faith, and not instituted from malicious motives, or for the purposes of oppression; and that the presiding judge will take care to prevent abuse and oppression, by not permitting a capricious, arbitrary, or malicious exercise of the power." Upon a view of all the authorities bearing upon this question, we are satisfied, that at all stages of a criminal prosecution before a jury is impaneled, the attorney general possesses an arbitrary control over his indictments, and that he may enter a *nolle prosequi* as to them, at pleasure, without the consent of the court or of the accused, and not run counter to the fifth article of the amendments to the constitution of the United States. But when the jury has been charged with the trial of a case, this right of the attorney general is suspended, or at least qualified, and can not be exercised against the consent of the court, which will in no case grant it, if the defense appears ample, or if the motion appears not to be in good faith, and to promote the ends of justice. This right may be exercised, even after conviction, when it is clear that no judgment can be pronounced on the verdict, on account of defects in the indictment. But whether this power, even with the permission of the court, can be exerted, without working an acquittal of the accused, after the jury impaneled to try have received the charge of the court, and retired to consider of their verdict, it is unimportant here to inquire; because, as has been said, the *nolle prosequi* in this case was entered at a time when the attorney general needed not even the consent of the court or the accused to justify it; that is to say, before the accused had been put on his trial, after the granting of the new trial, which placed the case as to the fact of manslaughter precisely where it was before there had been any trial at all. We

conclude, therefore, that the attorney general had a right, in this instance, to enter the *nolle prosequi* upon the indictment for murder, and bring one forward for manslaughter; and that the action of the court and of the attorney general was in good faith and not unfavorable to any right of the accused, who can not, in consequence thereof, claim to have been acquitted in fact or in law.

No objection was raised by the state to the right of the accused to bring this appeal from a preliminary decision or interlocutory decree of the criminal court, and we have considered the merits of the case as though such right existed; but it is not, therefore, to be concluded that we mean to sanction such a practice. On the contrary, we do not think that an appeal would lie in the case, as the right accrues, only after verdict and judgment and sentence; and if the attorney general had made a motion to dismiss the appeal, we should have felt bound to sustain it.

The judgment of the criminal court overruling the prisoner's pleas in bar is affirmed, and it is ordered, that the case be remanded, to be proceeded in according to law.

AUTREFOIS ACQUIT.—Trial and acquittal of a criminal by the court sitting without a jury, is not available under the plea of *autrefois acquit*, upon a second trial for the same offense, where, upon the first trial, the state had insisted upon a jury: *State v. Mead*, 30 Am. Dec. 661; and see *Commonwealth v. Somerville*, 5 Id. 514. As to whether a verdict of acquittal can be set aside, see the note to *State v. Solomons*, 27 Id. 469.

JEOPARDY, WHAT CONSTITUTES: See the note to *State v. McKee*, 21 Am. Dec. 499, discussing this subject: *State v. Ray*, 33 Id. 90; *Dunn v. State*, 35 Id. 54.

NOLLE PROSEQUI.—A *nolle prosequi* may be entered at any time until the jury is charged, but can not be entered afterwards; and the effect of entering a *nolle prosequi* after the jury is charged, is an acquittal of the prisoner: *State v. McKee*, 21 Am. Dec. 499; see also *Yocum v. Polly*, 36 Id. 583; *People v. McLeod*, 37 Id. 328; *State v. Whittier*, 38 Id. 272.

THE PRINCIPAL CASE WAS before the court at a previous term: See *ante*, 305.

SIMON v. BRASHEAR.

[9 ROBINSON, 59.]

CLIENT ENGAGING A LAW FIRM UPON A CONDITIONAL FEE can not set up as a defense, to an action by them, that one of them never took part in the trial of the case. Business intrusted to two professional men, associated as partners, may be attended to by either.

THE facts appear in the opinion.

AM. DEC. VOL. XLI—21

Dwight, for the appellant.

Maskell, and *T. H. and W. B. Lewis*, for the appellees.

By Court, MORRIS, J. Ethan Allen bought, in December, 1838, an undivided half of a tract of land on the Bayou Boeuf at a sheriff's sale, made in the suit of *Thomas Barretti v. Robert J. Walker*. William Bigler, who held the other undivided half in partnership with Walker, retained possession of the land and refused to recognize the rights acquired by Allen under the sheriff's sale, which conduct induced Allen to bring a suit against Bigler in 1839. About the same time Walker instituted an action to have the sheriff's sale to Allen annulled, on various grounds, which are fully set forth in the report of the case to be found in *Walker v. Allen*, 19 La. 307. Allen engaged the professional services of the plaintiffs to attend to these suits, and entered into a written agreement binding himself to pay them a fee of five hundred dollars in case of success, and two hundred and fifty dollars in case they did not succeed. Allen afterwards transferred all his rights to the property on Bayou Boeuf to the present defendant, who, among other stipulations in the deed of sale, assumed to pay all lawyer's fees, costs, etc., incurred by Allen, and accordingly signed the written agreement previously entered into with the plaintiffs. The two suits were prosecuted to a successful termination. The defendant having refused to pay the fee of five hundred dollars agreed to in case of success, the present suit was brought. The defense is, that Edward Simon, who was placed upon the bench of the supreme court of the state some time after the inception of these suits, never after appeared in them, nor rendered any service to the defendant. The jury to whom this case was submitted below brought in their verdict in favor of the plaintiffs, whereupon, judgment having been entered up in their favor, the defendant appealed.

It is difficult to perceive the force of the defense set up in this case. Had E. Simon bestowed upon the appellant's business the utmost personal care and attention, he could not have achieved for him more than was actually obtained, to wit, a judgment in his favor in both suits. The pleadings in the case are drawn up by Simon, and signed in the name of Simon and Maskell, and it appears that he engaged distinguished counsel to assist his former partner in the argument of the case before the appellate court; but even had he not done so, and had Maskell alone conducted the suits and gained them, the defense now

made would not have been listened to. When business is intrusted to two professional gentlemen, associated for the practice of the law, it may be attended to by either, and the client complains with bad grace, especially when he has gained his suit.

It has been urged that the verdict in this case is not in the form required by article 522 of the code of practice, as it mentions no specific sum. The defendant could have had this defect of form corrected before, or have made it a distinct ground for a new trial. He has done neither: Code of Practice, art. 528.

Judgment affirmed.

CONTINGENT FEES: See *Thalhimer v. Brinckerhoff*, 15 Am. Dec. 321, note.

NEW ORLEANS AND CARROLLTON R. R. Co. v. KERR.

[9 ROBINSON, 122.]

SERVICE OF NOTICE OF PROTEST ON AN EXECUTOR OF A DECEASED INDORSER, after the heir had come forward, been admitted as heir, given security, and taken possession of the property, but before the executor has rendered to the heir any account, or received from him the sums necessary to pay the debts, is good.

CREDITORS MAY LOOK TO THE EXECUTOR AS THE PROPER REPRESENTATIVE of the estate, until he has been duly discharged, especially when the heir resides out of the state.

NOTICE OF PROTEST DEPOSITED IN THE POST-OFFICE at Providence, where the note was payable and protested, is sufficient, if it is shown that the residence of the person to be notified is fifteen miles from there, but that he receives his letters at Providence.

ACTION against Kerr, the maker of a note, and Margaret Barker, the legatee and heir of one Harding, the indorser of the note. Judgment was given against the maker, but in favor of Barker. Plaintiff appeals from the judgment in favor of Barker. Other facts appear in the opinion.

Selby, for the appellant.

Wilson, for the appellee.

By Court, BULLARD, J. Two questions are presented for our solution in this case: 1. Whether the executor of a deceased indorser was the proper person on whom to serve notice of protest, after the instituted heir had come forward, been admitted as heir, and given security and taken possession of the property, but before the executor had rendered to the heir any account, or received from her the sums necessary to pay the debts; and, 2

Whether the notice of protest advertised to the executor at Providence, and deposited in the post-office at that place, where the note was payable and was protested, be sufficient, it being shown that his residence is about fifteen miles from Providence, in the same parish, and that he was in the habit of receiving his letters at the Providence post-office.

1. John D. Harding, the indorser, died before the note fell due, and William G. Holmes was duly qualified as executor of his last will, by which he instituted his sister, Margaret Barker, of Mississippi, his universal legatee. Early in May, 1843, she presented a petition to the court of probates to be admitted as heir of her brother with the benefit of inventory, and was admitted as such on giving security to the satisfaction of the court; and the executor at the same time ordered to be notified, and to account to the court for all the acts done by him as such executor. On the tenth of November she gave the bond required, but it is not shown that the executor had rendered any account, or been discharged on the twelfth of December, when the note was protested. It is contended by the counsel for the appellant, that under the act of 1837, testamentary executors continue to exercise their functions until the estates which they administer shall be entirely settled. We think this provision does not exclude the right of the heir at law, or the instituted heir, to put an end to the functions of the executor by claiming the estate, and being put in possession; but we are of opinion that the creditors may well look to the executor as the proper representative of the estate until he has been duly discharged, especially when the instituted heir resides out of the state. The evidence in the record does not show that the executor had any notice of these proceedings in the court of probates. We so held in *Tait v. Lewis, Executor*, 2 Rob. 351.

2. The note was protested at Providence, in the parish of Carroll, and the notice was served as shown by the evidence, to wit, the testimony of the notary, by addressing a letter to Holmes, as executor of the last will of the indorser, at that place, which was deposited in the post-office on the same day. It is not pretended that the notice did not contain a sufficient description of the note. The residence of the executor is shown to be about fifteen miles from Providence, in the same parish; that although there is a post-office in the state of Mississippi, at Princeton, nearer the house of the executor, it is not proved that he ever receives any letters or papers there, but that he is in the habit of receiving his letters at the post-office in Provi-

dence. The postmaster at the latter place testified, that Holmes receives his letters at his office; that sometimes he comes or sends for them once a week, sometimes once a month, and sometimes not so often; and that if a letter were left at his post-office for Holmes, directed to Providence, La., it would be put in his box, and remain until called for, and that he would not send it to him by mail. The direction of the note in this case appears to us in compliance with the second section of the act of 1827, which directs the notary, when the party to be notified does not reside in the city or town where the protest is made, to put the notice in the nearest post-office, addressed to him at his domicile, or usual place of residence: B. & C.'s Dig. 43.

In the case of *Nott, Executor, v. Beard*, we held that the address of the notice to the indorser at Pecan Grove post-office, was sufficient, that office being within the known domicile of the defendant, and nearest his residence: 16 La. 308. In *The Bank of Louisiana v. Watson*, the notice was deposited in the post-office at Baton Rouge. The defendant resided at some distance from town, in the same parish, and there was a post-office nearer to him; but the postmaster at Baton Rouge deposed that the defendant received his letters and newspapers at the office in town, and had directed them to be retained for him and not forwarded by mail. The notice was held good, although the parish of East Baton Rouge was not written on the notice: 15 Id. 38.

In the case now before us it appears that the executor had a box in the post-office at Providence, which circumstance we regarded, in the case of *Mead v. Carnal and Bryce*, 6 Rob. 552 [39 Am. Dec. 552], as a tacit instruction to the postmaster to retain any letters or papers to the address of the owner of the box. Upon the whole we conclude, that the court below erred in giving judgment and nonsuit against the plaintiff.

It is therefore ordered and decreed, that the judgment of the district court be avoided and reversed, and that the plaintiffs recover of Margaret Barker, the beneficiary heir of John D. Harding, deceased, the sum of one thousand six hundred and seventy-one dollars and eighty-four cents, with interest at the rate of seven per cent. per annum, from the twelfth day of December, 1843, until paid, with costs in both courts.

NOTICE OF DISHONOR OF NOTES AND BILLS, HOW MADE: For full discussion see note to *Ransom v. Mack*, 38 Am. Dec. 607-616. For notice by mail, when sufficient, see cases in this series collected in note to *Fish v. Jackman*, 36 Id. 771.

ROUTH v. ROUTH.

[9 ROBINSON, 224.]

MARRIAGE IN MISSISSIPPI, WITH THE INTENTION OF MAKING LOUISIANA THE RESIDENCE of the parties, and removing there within a reasonable time in pursuance of such intention, is governed by the laws of the latter place with respect to the wife's separate property at the time of the marriage.

THE facts sufficiently appear in the opinion.

Stacy and Sparrow, for the plaintiff.

F. H. and T. P. Farrar, for the appellants.

By Court, **BULLARD, J.** In this case the plaintiff sues her husband for a separation of property. She alleges that, in October, 1815, she intermarried with him in Adams county, Mississippi territory, and that he then resided in the parish of Concordia. That soon after their marriage, in pursuance of a well-known, previously expressed intention of both parties, they removed to his domicile and residence in the parish of Concordia. That she was then owner of a considerable property in her own right, which, after the marriage, was paid over to, and received by her said husband. She also enumerates several slaves and their increase, whom she alleges are in possession of her husband, who, it is averred, is in embarrassed circumstances. The Agricultural Bank of Natchez and James Brown of New York, alleging themselves to be creditors of the defendant to a large amount, intervened and made opposition to the plaintiff's pretensions. They deny that the plaintiff has any rights; they allege, on the contrary, that the parties were married and domiciled in the territory of Mississippi, where, by law, the personal property owned by the wife before the marriage, vests absolutely in the husband. This is admitted to be the law of that territory. The plaintiff had judgment according to the prayer of her petition, and the intervenors prosecute the present appeal.

There appears to be no difficulty in relation to the amount of the property owned by the plaintiff; and the only important question which the case presents, relates to the matrimonial domicile of the parties. According to the well-settled doctrine of the law, if the parties contracted marriage with a *bona fide* intention of making Louisiana the place of their common or matrimonial residence, and, in pursuance of such intention, did within a reasonable time, become domiciled in this state, then the property belonging to the wife before marriage, and received by the husband afterwards, or at the time, remained her sepa-

rate estate, according to the laws of Louisiana: *Le Breton v. Nouchet*, 3 Mart. 60 [5 Am. Dec. 736]; *Ford's Curator v. Ford*, 2 Mart. (N. S.) 574 [14 Am. Dec. 201]; Story on Conf. L., No. 191 *et seq.*

The evidence shows that the plaintiff was, at the time of her marriage, an orphan, residing with her uncle in the Mississippi territory, and that Routh was a minor, managing the plantation of his father, in the state of Louisiana. Judge Perkins, a perfectly disinterested witness, states that he had known the parties from an early period. The defendant, before his marriage, divided his time between his father's residence in Natchez, and his plantation on Lake St. Joseph, in the parish of Concordia. In 1814, he was his father's overseer on the same plantation. In 1815 his time was again divided between his father's residence and plantation. After their marriage they resided together on Lake St. Joseph, until about 1820 or 1822, and then often at their city residence, Natchez. Witness is not aware that Routh ever relinquished his citizenship in Louisiana. He kept up two establishments; one for the advantage of society, and the other for profit. He states that Routh was more than once elected to the legislature, and was often a member of the police jury. This witness can not say what were the intentions of the parties as to residence, but thinks it most likely that they intended to reside in Louisiana, as Mr. Job Routh told him, he had paid his son John, the defendant, five hundred dollars a year as an overseer for him, prior to his marriage, and that he sanctioned his marriage, young as he was, on condition that he would reside with his family, on his (Job Routh's) plantation, in Concordia; and that he was to pay him hire for Mrs. Routh's negroes one thousand five hundred dollars, to be added to the five hundred dollars as overseer, making two thousand dollars. He was to pay his son annually for his services, and the use of her property. They did reside on his father's plantation some two, three, or four years; afterwards at Hollywood, the residence of John Routh, on Lake St. Joseph, until after the completion of their town house, after which their time was measurably divided between the two places. It is clearly shown that, soon after the marriage, the parties did remove to, and establish their matrimonial domicile in Louisiana; and several witnesses, whose testimony is unimpeached, have testified that this removal was in pursuance of a previous declared intention of the parties.

The evidence of citizenship of John Routh from 1814 till 1822,

is full and conclusive. We find him representing his neighborhood in the police jury; sometimes his parish in the house of representatives of the general assembly, and frequently in attendance upon the courts as a grand or petit juror; in short performing the various actions of a citizen. If, in 1833, he made a formal declaration of his intention to make the said parish of Concordia his sole and exclusive domicile, it by no means implies that in law, his domicile was not in fact previously there; and we can regard that declaration as having no other effect than to give public notice, that, although a part of the year was spent in a place which offered greater resources in a social point of view, and especially for the education of his children, yet he still retained the parish of Concordia, as his sole legal domicile.

The intervenors have pleaded the prescription of five, ten, twenty, and thirty years; but their counsel has not explained to us by what part of the code, or the laws of the land, the claims of the wife against the husband can be lost by prescription, during the existence of the marriage. Upon the whole we conclude, with the district court, that the rights of the parties are to be governed by the laws of Louisiana.

Judgment affirmed.

LAW GOVERNING THE MUTUAL RIGHTS OF MARRIED PERSONS: See *Pritchard v. Citizens' Bank*, 28 Am. Dec. 132; *Hicks v. Pope*, Id. 142.

WIFE'S RIGHTS WILL BE GOVERNED BY THE LAW of the country into which she intended to remove at the time of the marriage, if such removal is afterwards made: See *Ford's Curator v. Ford*, 14 Am. Dec. 201; *Murphy v. Murphy*, 12 Id. 475, and note; *Medway v. Needham*, 8 Id. 133, and note; also note to *Le Breton v. Nouchet*, 5 Id. 736.

CLAY v. BALLARD.

[9 ROBINSON, 308.]

CONTRACT WILL NOT BE PRESUMED TO HAVE IMPOSED AN ABSURD OR IMPOSSIBLE CONDITION on one of the parties, but will be interpreted as the parties must be supposed to have understood the condition at the time. CONDITIONAL OBLIGATION TO PAY AN ATTORNEY AN EXTRA FEE IN CASE OF SUCCESS in an action in which the obligor is not a party, is given upon a valid and sufficient consideration, if such obligor is a party to other suits in which the same question is involved.

ACTION upon a promissory note, signed by one Slaughter for one thousand and by defendant for four thousand dollars. The condition annexed to the note is quoted in the opinion. The defense is, that defendant was not a party to, nor directly in-

terested in, the suit of *Groves v. Slaughter*, and that he believed at the time he gave the note, that a decision by the supreme court of the United States in that case would be binding on the courts of the state of Mississippi, and compel them to decide all similar questions arising before them, in the same way. That said decision has no binding force upon the said state courts, and hence is of no value legally or morally to defendant, and that therefore said note was given without a consideration. Other facts appear in the opinion.

R. H. Chinn and R. Hunt, for the appellant.

Grymes, for the defendant.

By Court, BULLARD, J. The defendant, having an interest in the question involved in the case of *Groves v. Slaughter*, 15 Pet. 449, then pending in the supreme court of the United States, in which the plaintiff, together with other eminent counsel, was engaged for the defendant in error, and before the argument of the case, inclosed to him his conditional obligation for four thousand dollars, as an extra fee. The condition expressed on the face of the obligation, as will be seen by reference to the note, in the statement of facts, was, "that the decision of the said court, in the said case, settled fully the question as to the validity of all contracts for the sale of slaves in the state of Mississippi, since the year 1833, or between the year 1833 and the time when the Mississippi legislature passed the act fixing the penalty for the introduction of slaves, say about May, or June, 1837." The plaintiff brings the present action to enforce that obligation, on the allegation that the condition has been complied with and accomplished; and he is appellant in this court from a judgment against him in the commercial court.

The new constitution of the state of Mississippi contains the following clause: "The introduction of slaves into this state as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833, provided that the actual settler, or settlers, shall not be prohibited from purchasing slaves in any state in this union, and bringing them into this state for their own individual use, until the year 1845." *Slaughter* having sold slaves in that state, which had been carried there for sale, after May, 1833, and before 1837, sued for the price, and the question which the case presented was, whether the above recited clause in the constitution was, *per se*, prohibitory, independently of any legislative enactment, so as to render void any contract made in contravention of it. It was not until several years after

the contract in question, that the legislature acted in relation to the matter, and provided for the infliction of certain penalties. In the mean time, contracts to a vast amount had been entered into by various dealers in slaves, and, among others, by the present defendant. The defense had been made in different courts, and in relation to contracts involving a large amount, that such contracts were void under the constitution itself, independently of any legislative enactment. The defendant, therefore, was solicitous to have a decision of the supreme court of the United States, which should settle that question, to wit, "the validity of all contracts for the sale of slaves in the state of Mississippi, since the year 1833, or between the year 1833 and the time when the Mississippi legislature passed the act fixing the penalty for the introduction of slaves," etc.

On recurring to the decision of the supreme court of the United States in that case, *Groves v. Slaughter*, 15 Pet. 449, it will be perceived that the court did decide, that the contract sued on was a valid and binding contract; that the plaintiff below had judgment; that the court expressly decided that the clause in the constitution was only directory to the legislature, and did not, *per se*, import an absolute prohibition; and consequently, that sales of slaves brought into the state after May, 1833, as merchandise, and for sale, were valid contracts. As between the parties, and in relation to that particular contract, the judgment was full, final, and conclusive. It has the force of *res adjudicata*; and there is every reason to suppose that the same court will, in similar cases, come to the same conclusion.

But it is contended that the decision has not fully settled the question as to all similar contracts; that, on the contrary, the courts of the state of Mississippi have uniformly disregarded that decision, and maintained a doctrine diametrically opposite thereto; that they regard the constitution as having the paramount authority of the supreme law; as settling the public policy independently of the legislature; and consequently, all contracts entered into in contravention of it, as void. This is undoubted; and this court has, on one occasion, unanimously, and after solemn argument and mature consideration, come to the same conclusion, in a case in the western district: *Cotten v. O'Brien*, 6 Rob. 115. But the question is, how the parties must be supposed to have understood the condition at the time. It can not be imagined that the defendant intended to impose either an absurd, or an impossible condition; and to make the payment of the additional fee depend upon the fact,

that the judgment to be pronounced by the court in the case of *Groves v. Slaughter*, to which the defendant Ballard was not a party, should, in all courts, and between all parties, whenever a similar question should arise, carry with it the absolute authority of the thing adjudged. No man in his senses would enter into any such engagement. If Ballard had been asked at the time, what he understood by fully settling the question as to the validity of all such contracts, he would probably have answered, so far as the question can be finally settled in that case, by the supreme court of the United States affirming the validity of that class of contracts. He can not be supposed ignorant of the principle, that the question presented in that case is not of the peculiar *ressort* of the federal judiciary; that it is only particular classes of persons, who, in consequence of their citizenship in a different state from their adversary, or of alienage, would be entitled to bring such a question before the United States courts. The defendant evidently expected to profit by the moral operation of that decision, in enabling him to make arrangements with his debtors, rather than by its legal effect in any particular case. Hence we find that he did make many arrangements, more or less advantageous, on the strength of that decision; and that he secured one debt of that kind, which was in suit, and a similar defense made in a Mississippi court. The defense was voluntarily abandoned. But it is contended that the defendant labored under an error both of law and of fact; and that he must have been under the impression that the judgment of the supreme court could, and would protect him, in point of fact, from the effect of any such defense as was set up in that case, while it clearly appears that it has not, and that it could not do so. To this it may be answered, that nothing shows that such was the motive of the defendant; and even if it was, he has, by entering into compromises without awaiting the final judicial decisions on his own claims, put it out of the power of his adversary to show what might have been, as to him, the legal effect of the judgment in the case of *Groves v. Slaughter*. It is not shown that he has lost any claims by the decision of any court disregarding the principle settled in that case.

It is further urged, that the court decided the case upon only one of the grounds relied on in the argument of the able and distinguished counsel, the other point relied upon, to wit, how far the provision in the constitution of Mississippi conflicted with the grant of power to congress to regulate commerce between the states, not having been settled; and that as to the

other question relating merely to the construction of the state constitution, it was well known that the supreme court of the United States was bound by the decisions of the state tribunals. Such is clearly the general rule they have prescribed to themselves in that class of cases; but in the case of *Groves v. Slaughter* they expressly say that the state tribunals had not so positively settled the law, as to bring the case within the rule. The defendant appears to have been aware of this; for he had suits pending in Mississippi for large amounts, the final termination of which was doubtful.

It is obvious there was a sufficient legal consideration for the promise. In the letter written to the plaintiff, and signed by the defendant and Slaughter, inclosing the note now sued on, they say: "We are satisfied that we are represented by able counsel, who will use their best efforts in our behalf for the price already stipulated, but relying on your ability and best exertions more particularly, we feel justified in inclosing you the above obligation," etc. Here the defendant holds himself out as interested in the case itself as well as Slaughter, and the evidence shows that he was interested in the question to a large amount. Nor do we see anything immoral, either in the offer, or the acceptance of such extra compensation, in case of success. The testimony of Judge Montgomery shows, that Ballard had, at the time the above mentioned suit was pending in the supreme court of the United States, claims to the amount of nearly two hundred thousand dollars, against citizens of the states of Mississippi and Louisiana, which were liable to the same defense made by Groves; that in one in particular against General Brandon, for about sixteen thousand dollars, the defense had been abandoned after the decision of the supreme court. The same is shown in the deposition of Chancellor Quitman, who gives the particulars of a compromise of one claim, amounting to upwards of one hundred thousand dollars.

But it may be asked, what judgment could the court have pronounced in the case of *Groves v. Slaughter*, more favorable to the present defendant, either considered as a party, or as having an interest in the question, not explained at the time to the counsel employed. One witness proves the promise of the defendant to pay the amount of the note, after the decision had been rendered. Although this evidence may be insufficient alone to condemn him, yet it tends to show at least his construction of the contract, and his understanding of the condition upon which depended his obligation to pay. He has made use of the judg-

ment as an argument to his debtors to induce them to waive any such plea, and held it out to them as conclusive upon this question. We, therefore, conclude, that the condition, as it must have been understood by the parties at the time, has been accomplished; that so far as the court could in that case, it did fully settle the question of the validity of such contracts; that the binding authority of the judgment, as to the parties, remains unimpaired; that the plaintiff was far from warranting that it would, in all other cases, and in other courts, be adopted as the unerring guide of decision; and that, consequently, the plaintiff is entitled to recover.

It is, therefore, adjudged and decreed, that the judgment of the commercial court be reversed; and ours is, that the plaintiff recover of the defendant four thousand dollars, with interest, at five per cent., from judicial demand (January 9, 1843), with costs in both courts.

ALTHOUGH NO ACTIVE SERVICE BE SHOWN, yet, when the attorney's inaction might have resulted from the conviction that it would lead to a compromise by which the claim against the client would be abandoned, and such compromise is made, a recovery may be had upon a note given for a stipulated fee: *Hensen v. Bourgeat*, 12 Rob. (La.) 522.

WORSLEY v. THE SECOND MUNICIPALITY OF NEW ORLEANS.

[9 ROBINSON, 324.]

ORDINANCE IMPOSING A WHARFAGE CHARGE UPON ALL PACKAGES LANDED OR SHIPPED within the city limits is not in conflict with that clause of the federal constitution giving congress the power to regulate commerce with the several states and foreign nations, and declaring that no state shall tax or lay a duty on exports or imports.

RIGHT TO LEVY WHARFAGE UPON PERSONAL PROPERTY IN TRANSITU THROUGH THE CITY, and not belonging to residents, is not given by a grant of "power to raise by tax, upon the real and personal estate within the city, such sums as may be necessary," etc.

GRANT OF POWER TO A CITY TO CONSTRUCT AND REGULATE WHARVES GIVES BY IMPLICATION the power to levy a tax upon goods and merchandise landed and shipped at them.

MONEY HAVING BEEN PAID THAT COULD NOT HAVE BEEN LEGALLY COLLECTED, yet if there was a natural obligation resting upon the party to pay, he can not maintain an action to recover it, upon the rule of equity that no man ought to better his condition at another's expense.

THE facts sufficiently appear in the opinion.

Cooley, Upton. and Eustis, for the plaintiffs.

Rawle, Hunt, and Soule, for the appellants.

By Court, **BULLARD, J.** The plaintiffs sue to recover back from municipality No. 2, about three hundred and ninety-three dollars, which they allege they paid, at different times, as a tax on goods, wares, and merchandise, which they had received from the state of Missouri, and other western states, on the introduction of the same within the limits of said municipality, and upon goods so received, which were exported by them from the port of said municipality. That these taxes were collected in virtue of certain municipal ordinances, and that in making said payments, the plaintiffs believed that they were bound to do so; but that they have since been advised that said municipality has not, and had not, at the time, a legal right to impose and collect such a tax; and that, consequently, said payments were made in error. The defendant answers by a general denial, and averring that the plaintiffs have shown no cause of action.

The ordinance charged to be illegal and to have been ordained without sufficient authority, is that of the twenty-third of June, 1842, imposing, what is called wharfage, upon all and every description of packages, etc., which may be landed in, or shipped from the limits of the municipality. It is admitted in the record, that the packages mentioned in the plaintiffs' bill, were conveyed on, and across one of the wharves on the river Mississippi, within the limits of the municipality. That the wharves were built and paid for, either by the corporation of New Orleans, or by said municipality. That the landing and shipping of goods and merchandise, has been greatly facilitated by means of said wharves; and that they do not extend further into the river than is required to afford the facilities above mentioned. The illegality of the ordinance is asserted on two distinct grounds: 1. That it is in violation of the constitution of the United States; 2. That, even supposing that the ordinance does not conflict with the constitution, yet the municipality is without authority granted to it by the legislature, to impose and levy such a tax. It is under this double aspect we proceed to examine the case.

1. It is said in argument, that the ordinance conflicts with those provisions of the federal constitution, which give to congress the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; which declare that no tax or duty shall be laid on articles exported from any state, and that no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except

what may be absolutely necessary for executing its inspection laws. If the wharves built and kept up by the municipalities at such vast expense, had been erected by and belonged to the state, as administrator of the port of New Orleans for the use of the public, instead of the city, we could not entertain any doubt of its constitutional right to impose the wharfage in question. The authorities and adjudged cases, which we have had occasion to examine in the course of the investigation of the present case, and that of *The State v. Fullerton*, 7 Rob. 210, lately decided, have satisfied us, not only that there is no regulation of commerce established by congress, which conflicts with this ordinance, but that the constitution never intended to give congress authority to interfere in relation to those ordinary facilities afforded to commerce, in the shape of wharves, and other instruments or means of trade, as mentioned particularly in the case of *The City of New York v. Miln*, and among the rest, the preservation of harbors, of wharves, the keeping open of rivers, as subjected to the state laws: 11 Pet. 143. But the supreme court of the United States were still more explicit on the subject, in the case of *Gibbons v. Ogden*. They say: "As to laws affecting ferries, turnpike roads, and other subjects of the same class, so far from meriting the epithet of commercial regulations, they are in fact commercial facilities, for which, by the consent of mankind, a compensation is paid, upon the same principle that the whole commercial world submit to pay light money to the Danes:" 9 Wheat. 235.

These distinctions were recognized more than twenty years ago by this court, in the memorable case of *The State v. The Navigation Company*. The freedom of navigation, it was then said, which was contended for, is not incompatible with certain regulations. "It is not so absolute as to be inconsistent with submission to ferriage laws, giving to citizens residing within or without the territory, the convenience of finding, at suitable places, at all times, and for a fixed compensation, the means of crossing; nor with quarantine laws, which forbid the advance, in the midst of the shipping anchored before a city, of vessels having, or even suspected to have on board persons laboring under a contagious disease, to the danger and terror of its inhabitants." "Nor with submission to a law which provides a compensation for the labor and expense bestowed by an individual, or corporation, on the improvement of the navigation of a watercourse, attended before with difficulty and danger, to be paid by those, who, by such means, navigate with ease and safety." The court further

say, that the words *imposts, tax, or duty*, "must be confined to the idea which they commonly and ordinarily present to the mind, as exactions to fill the public coffers, for the payment of the debts, and the promotion of the general welfare of the country; not to a retribution, provided to defray the expense of building bridges, erecting causeways, or removing obstructions in a watercourse, to be paid by such individuals only as enjoy the advantages resulting from such labor and expense:" 11 Mart. 323 *et seq.* This reasoning applies with great force to the case now before us. In most of the states, it is understood that wharves are private property, and are administered by the owners. Here, they are exclusively under the regulation and control of the city authorities, who alone are authorized to construct and to keep them up for the convenience of commerce. The condition of this port would be lamentable indeed, if those facilities were now withdrawn. The expenses of rigging stages, every time a steamboat or a vessel of any kind, was to be loaded or discharged; the enormous charges which would necessarily arise, for drayage through the mud and water now covered by the wharves, before reaching the crest of the levee, not to speak of the damage to packages of merchandise so exposed, would more than quadruple those paid, under this ordinance, as a remuneration for the great convenience and accommodation afforded by the present improved system of wharves.

2. The remaining question, to wit, whether the city corporations have, by their charters, any authority conferred on them by the legislature, to impose the tax or toll, or by whatever name it may be called, is not so free of difficulty. The right to establish wharves, is expressly given by the civil code. "The corporations of cities, towns, and other places may construct on the public places, in the beds of rivers, and on the banks, all buildings and other works which may be necessary for public utility, for the mooring of vessels, and the discharge of cargoes, within the extent of their respective limits:" Art. 859. The authority to regulate, as well as to make all improvements to the streets, public squares, wharves, and other public property, the use of which is now common, is given to each of the municipalities by the act of 1836, dividing the city into three municipalities: See Dig. of B. & C. 120. The sixth section of the act of 1805, incorporating the city of New Orleans, gives the city "power to raise by tax, in such manner as to them may seem proper, upon the real and personal estate within the city, such sum, or sums of money, as may be necessary to supply any de-

iciency for the lighting, cleaning, paving, and watering the streets of said city, for supporting the city watch, the levee of the river, the prisons, the workhouses, and other public buildings, and for such other purposes as the police and good government of the said city may require," etc.: Dig. 94.

Here is a very ample grant of power to tax real and personal property; but we are not ready to say that personal property, *in transitu* through the city, not belonging to the citizens of New Orleans, not composing what is called in the statute personal estate within the city, is liable to be taxed under this grant of power. On the contrary, we think we must look elsewhere for the justification of the city councils in imposing the tax in question. In inquiring into the true character of the tax, or due imposed by the ordinance, the whole of it ought to be viewed together, as well as the circumstances which preceded its enactment. We readily admit the distinction between a tax in the ordinary acceptation of the word, and a toll or contribution which is exacted in consideration of facilities afforded. The distinction is well illustrated in the case, to which our attention was drawn by the senior counsel for the defendants, whose own argument on this point was very able and discriminating, from the eleventh volume of Johnson's reports. It would seem that in New York churches are exempt from taxation. A religious corporation claimed exemption from certain assessments under the law in that city, similar to ours, relating to the opening of streets, asserting that the burden thus imposed was a species of tax. But the supreme court of that state held, "that these assessments are intended and directed to be made upon the owners of lots and lands which may receive benefit and advantage by the improvement. The exemption granted by the act of 1801, was in the general act for the assessment and collection of taxes, and the provisions of that act all refer to general and public taxes to be assessed and collected for the benefit of the town, county, or state at large." The opinion gives also legal definitions of tax and talliage by Lord Coke and Lord Holt, which evidently justify this distinction: *Matter of Mayor etc. of New York*, 11 Johns. 80.

The only statute which has been brought to our notice, or which our own researches have enabled us to find, from which might be inferred, by implication, the authority to impose any such tax, is that of the fifteenth of February, 1808 (see 1 Moreau's Digest, *verbo* Levée), concerning the police of the shores of navigable rivers, and for other purposes. The fourth section pro-

vides, that "any person who shall be convicted of having received any compensation for the landing of any embarkation before his land, or for any other use permitted by the laws of this territory, which provide that the shores of navigable rivers shall remain free for the common use of all men, shall, for each contravention, be fined in a sum not less than five hundred dollars; provided that the present provision shall not be applicable to the duties which corporations of cities or towns have a right to establish in their ports." From the whole tenor of this act, it would seem that it was the object of the legislature to prevent individuals from erecting any artificial works on the banks of the river, with a view of deriving an emolument from the facility they might afford to the public. The reservation, therefore, which is made in favor of cities and towns, can hardly be considered as confined to the tonnage or anchorage duty established by an ordinance of O'Reilly; because that was paid by the vessel in proportion to her tonnage, for the privilege of anchoring alongside of the levee, and without reference to any other artificial works or facilities than the embankment itself, commonly called the levee, and does not contemplate any charge for the landing of cargoes.

The record shows, that between May, 1836, and June, 1842, there had been disbursed by the defendants, for the construction and repairs of wharves and levees, upwards of four hundred and eighty-four thousand dollars; and, in the same period, for the paving and repair of streets, upwards of one million three hundred and sixty thousand dollars. These improvements have greatly facilitated the commerce of the country, both foreign and domestic. Before the building of those wharves, it was, at times, impossible to land goods there without the use of stages, and few vessels landed there. They are shown to be well adapted to the trade, and not to extend into the river more than is necessary. It is shown that before the wharves were built, no shipping went up there, because they could not use the landing. The authority of the municipality to construct and keep up these works is positively shown. Their authority to regulate them is equally clear. The right to ask a remuneration for the use of them in the shape of a tax upon goods and merchandise landed in the city, rests upon implication; and since the passage of the act of thirtieth March, 1843, "to define the powers of the corporation of the city of New Orleans," by which the collection thereafter of such tax, duty, or charge is forbidden, thereby giving a legislative construction to the

different laws relating to the subject, must be considered as no longer existing: Acts of 1843, p. 55.

The question then occurs, not whether the collection of this charge could be legally coerced, but whether, having been paid, it can be recovered back. Let us simplify the matter. A., living on a watercourse, with miry banks, difficult to ford, obtains permission from the legislature to build a bridge for the accommodation of travelers. He obtains the permission to build, to keep up and regulate the bridge, but no express authority to demand a toll from travelers. He, however, gives notice that those who pass the bridge must pay a moderate toll. B. passes over and pays; but afterwards discovering that no positive law had authorized the exaction, sues to recover back what he has paid. Can he recover? This is the *conditio indebiti* which we derive from the Roman law, with very slight, if any modification. The civil code lays down the principle that, "he who has paid through mistake, believing himself a debtor, may reclaim what he has paid. To acquire this right, it is necessary that the thing paid be not due in any manner, either civilly or naturally." Arts. 2280, 2281. Among the natural obligations, enumerated by the code, the first is: "Such obligations as the law has rendered invalid for the want of certain forms, or for some reason of general policy, but which are not in themselves immoral or unjust:" Art. 1751. "No suit will lie to recover what has been paid, or given in compliance with a natural obligation:" Art. 1752.

The principles which govern this action are developed much at length, and illustrated by various examples, in the fifth title of the twelfth book of the Roman Digest. It is treated as an equitable action, and the plaintiff must show himself entitled to recover *ex æquo et bono*. It begins by announcing the general principle to be: "*Si quis indebitum ignorans solvit, per hanc actionem condicere potest. Sed si sciens se non debere, solvit, cessat repetitio.*" And here we find in connection with the doctrine relating to this action, the great rule of natural equity, that no man ought to better his condition at another's expense. "*Hoc naturâ æquum est, neminem con alterius detrimento fieri locupletiores.*" If the party receiving the payment may conscientiously retain it, on account of some natural obligation on the part of the person making the payment, then the latter cannot maintain this action. A mere right to withhold payment does not necessarily imply a right to recover back what has been paid: "*Ex quibus causis retentionem quidem habemus, peti-*

tionem autem non habemus: ea, si solverimus, repetere non possumus." The mother who had settled a dowry, believing she was bound to do so, was not allowed to take it back. The reason given is: "Sublatâ enim falsâ opinione, relinquitur pietatis causa ex quâ solutum repeti non potest."

The owner of the bridge, in the case supposed, has no right to prevent the traveler from crossing the river, which is public, and free to the whole world; and, perhaps, he has, strictly speaking, no legal right to demand the toll. But the traveler has voluntarily paid it, and has availed himself of the convenience, afforded him by the owner of the bridge at his own expense, by which means the river has been crossed with less risk to the traveler. He can not recover it back, without violating a rule of natural equity—without enriching himself at another's expense. We have recently had occasion to apply this great equitable principle to the case of the tobacco inspectors, who received something over and above what the law allowed for a fee, for their trouble in sampling the article: See *Hills et al. v. Kernion et al.*, 7 Rob. 522, decided in May last.

In the case now before us, if the act of 1808, coupled with the power to regulate the wharves, and the general power of taxation, did not authorize the municipality to exact the wharfage dues, they at least show, in our opinion, that the corporation had, at their own expense, conferred upon the growing commerce of the country an immense advantage; if those who availed themselves of those advantages, had contracted to pay a certain remuneration for the use of the wharves, such a contract would have rested upon a substantial, equitable consideration, which, not being forbidden by any positive law, might have been enforced. Without any such agreement the tax was paid by the plaintiffs, acting probably as factors for the owners of the goods, and may very conscientiously be retained. If the plaintiffs had invoked the aid of the court, *re integra*, to prevent this exaction, it is probable we should have thought ourselves authorized to arrest the arm of the municipal authorities, as without sufficient legal authority to level and coerce the payment of such a tax. But it has been voluntarily paid—it has gone to relieve the city from a burden created by the construction of these public works for the benefit of commerce. The plaintiffs, and their correspondents, have derived advantage and profit from those expenditures, which the city was under no legal obligation to furnish, to the extent at least that they now exist. They knew when they paid, that it was in the nature of a remuneration for

the use of the wharves; there was a natural obligation to pay; and equity forbids that they should recover it back.

It is therefore ordered, that the judgment of the commercial court be reversed, and that ours be for the defendants, with costs in both courts.

ORDINANCE authorizing an inspector to measure coal sold within the city and allowing him a fee therefor, is not repugnant to the federal constitution, as applied to imported coal: *City Council v. Rogers*, 13 Am. Dec. 751.

FEES ALLOWED MASTERS AND WARDENS for an inspection and survey of vessels and of damaged goods are in no sense imposts and duties on exports and imports: *Masters and Wardens v. Ship Martha J. Ward*, 14 La. Ann. 289.

SUCCESSION OF ALICE PACKWOOD.

[9 ROBINSON, 438.]

LAWS OF LOUISIANA GOVERN THE MATRIMONIAL COMMUNITY OF GAINS OF MARRIED PERSONS from the time of their arrival within the state, but cease upon their removal.

EXECUTOR CAN ADMINISTER ONLY UPON PROPERTY SITUATE WITHIN THE STATE from whose courts he derives his powers.

SEPARATE TITLE TO HALF THE COMMUNITY PROPERTY DOES NOT VEST IN THE WIFE immediately upon the removal of the parties from Louisiana, but only upon the death of one of them; until then the husband has full control, except he can not alienate in fraud of her rights.

PERSONAL PROPERTY HAS NO OTHER SITUS THAN THE DOMICILE OF THE PARTIES; hence the proceeds of community property situate in Louisiana, and placed in the bank there to the husband's credit, can not upon the death of the wife, the parties residing in New York, be administered on in Louisiana as part of her estate there.

The facts appear in the opinion.

Lockett, Micou, and Hennen, for the appellant.

Wilde, Roselius, and Mazureau, contra.

By Court, **BULLARD, J.** In order properly to understand the question which this case presents, it is necessary to premise that Samuel Packwood, and his late wife, Alice Packwood, were married in the state of Connecticut, and, in the year 1804, removed to Louisiana, where they resided until 1836, and acquired a considerable property, consisting of a plantation and city houses and lots, in community, according to our local law. That, in 1836, they returned to the north, and fixed their domicile in the city of New York, where the community of acquets does not exist. One undivided half of a large plantation in the parish of Plaquemine, was sold to their son, Theodore J. Pack-

wood, who is still in possession. That, Mrs. Packwood died in New York in the summer of 1840, and Theodore J. Packwood was appointed to administer on her estate situated in Louisiana, where her heirs at law reside, and caused an inventory to be made. A testament of Mrs. Packwood was subsequently produced, by which she appointed her husband, Samuel Packwood, her executor, and he qualified as such in the court of probates of the parish and city of New Orleans, and proceeded to have a new inventory made. In neither of these inventories is any part of the plantation in Plaquemine included. At this inventory, the executor made the following declaration, in substance, which was embodied in the act, to wit: That, at the death of his wife, he and his said wife resided, and had resided for several years in New York, where the community of acquets does not exist by law. That at that time he was the owner of three hundred shares of the city stock, and one hundred and two and a half shares of the country stock of the Union Bank of Louisiana, and of fourteen thousand seven hundred and forty-seven dollars and seventy-seven cents in cash, deposited in the Commercial Bank to his credit on the thirtieth of June, 1840, and for which negotiable certificates of deposit were remitted to him, on the twenty-seventh of July, 1840; and he declared that the said stocks and money are governed by the laws of New York, the place of his domicile and that of his wife, and are his exclusive property, and form no part of the community lately existing between him and his late wife in Louisiana, and that no part belongs to her succession.

The question which alone is presented for our solution on the present appeal, is, whether the sum of fourteen thousand seven hundred and forty-seven dollars and seventy-seven cents belongs to the community, and is to be considered as a fund in the hands of the executor, applicable to the payment of the debts of the community, one half of which are due by the estate of Alice Packwood in Louisiana. The question arises in the following manner: The executor having presented a statement of debts for which provision was to be made, which was approved, next presented a petition, in which he represents, that the debts amount to upwards of fifteen thousand dollars; that the real estate, lately held in common between himself and the heirs of his wife, had been divided, under a decree of the district court for the first judicial district, and that the estate of his wife had thus become sole proprietor of certain property designated and described in the act of partition; that there is no more property

belonging to the estate; and that it becomes necessary to sell a part of said property to pay the debts; and he prays for an order to that effect, contradictorily with the heirs.

In answer to this petition the heirs allege, that the partition alluded to is imperfect and provisional only, and that the executor has nothing to do with the payment of the debts mentioned by him. That, if the court should be of opinion that he has still the power of seeing that any debt due by the estate of the testatrix be paid, when he is not sued for the same in his said capacity, and when a partition has taken place as he alleges, yet there is no reason why any part of the property should be sold for the payment of said debts, because the executor has in his hands more funds belonging to the estate, than are necessary to cover the whole amount of said debts, which he has received since the death of the testatrix; which funds consist, among others, of fourteen thousand dollars and upwards, of which one half belonged to the estate of Mrs. Alice Packwood, and was in this city at her death, and which he has since received. The answer proceeds to set forth other amounts which it is charged belong to the estate, but which it is not now necessary to detail, because the only question now before us, as remarked above, relates to the ownership of the sum of upwards of fourteen thousand dollars, deposited in the Commercial Bank; all other questions to which the case may give rise, being reserved for future consideration. The court of probates sustained the opposition of the heirs, being of opinion, that the sum above mentioned was community property, and applicable, in the hands of the executor, to the payment of the debts, and refused to order a sale of any part of the property for that purpose, and the executor appealed.

The facts shown by the record, in relation to the deposit in the Commercial Bank, are, that W. G. Hewes was the agent of Samuel Packwood, then residing in New York, and of the sugar plantation of Packwood, for the purpose of selling the sugar produced on the place. On the twenty-fifth of July, Hewes had in his hands, belonging to Packwood, the above-mentioned sum, which had been passed to his (Samuel Packwood's) credit, by order of Theodore J. Packwood, and which he remitted to Mr. Packwood in New York, on the twenty-seventh of July, of the same year, in certificates of deposit in the Commercial Bank. The above was a balance due, after deducting three hundred and ninety-eight dollars and twenty-seven cents due by Packwood to Hewes. It was the proceeds of the sale of sugar

raised on the plantation managed by T. J. Packwood. Mrs. Packwood died in New York, after the sale of the sugar, and after the balance in the hands of Hewes had been placed on deposit in the Commercial Bank.

Numerous questions have been raised at the bar, springing out of the law of community as it now exists, and formerly existed according to the Spanish law, and relating to the conflict of laws. They have been argued with great ability and learning. Upon many of these questions the present controversy, narrowed down as it is to an inquiry into the true character of the credit in the Commercial Bank, does not require a decision from us. We may assume the following propositions, believed to be incontestable, as the basis of our reasoning on the point presented for our solution: 1. On the removal of Packwood with his wife, to reside in Louisiana, in 1804, the laws in force at that time establishing and regulating the matrimonial community of gains, operated upon the property acquired during their residence here, it becoming property of the community. 2. On their change of domicile, in 1836, by returning to reside in a state where a different law prevails, the law of Louisiana ceased to operate upon acquisitions of property, made afterwards here, where neither party resided, whatever may be the effect of such removal as to property previously acquired during their residence; and consequently, if Packwood had acquired property here after his removal to New York, it would have been his, according to the law of his domicile. 3. The executor of the last will of a testator, who was domiciliated and died in another state, deriving his powers from a probate court in Louisiana, administers only on the property of the deceased situated in Louisiana. That part alone of the estate of the testator is under the control of the courts of this state. Whatever estate, therefore, Mrs. Packwood may have left in New York, is to descend, and to be administered according to the law of that state.

Another proposition has been contended for by the counsel for the appellees, which, it is supposed, would have an important bearing on the decision of this cause, to wit: that on the removal of Packwood and his wife to New York, the community which existed between them here ceased not only as to future acquisitions, but that the parties became vested at once, each with one undivided half, and the power of the husband was terminated in relation to it. We are not prepared to subscribe to this doctrine, to its full extent. It would go to exonerate prop-

erty acquired here, from liability for debts contracted afterwards during the marriage; it would authorize the wife, no longer a resident here, but still subject to marital authority, to assert her rights independently of that authority, to require a liquidation of all debts due by the husband, distinguishing between those contracted in Louisiana, and those contracted elsewhere; it would deprive the husband, while the marriage still exists, of the fruits of the property acquired here, upon which the expenses of the family are an essential charge; in short, it would lead to all the consequences which by law follow from natural death, divorce, or separation from bed and board. We can not doubt the authority of the husband, after his removal, to administer the property acquired here, any more than his right to enjoy the fruits of the dotal property; and we can not recognize in Mrs. Packwood any distinct separate title, vested in her before her death. One half of the property acquired in Louisiana then vested in her heirs, subject to the payment of the debts contracted by the husband during the marriage. Up to that period the husband had, in our opinion, entire control over the property, subject to the restrictions in the code upon his power of alienation in fraud of her rights.

The three propositions above stated may be regarded, in fact, as corollaries from the principles settled in the leading case of *Saul v. His Creditors*, 5 Mart. (N. S.) 569 [16 Am. Dec. 212], that the law establishing and regulating the matrimonial community of gains is a real statute, operating only upon property acquired here, followed by that of *Cole's Widow v. His Executors*, 7 Id. 41 [18 Am. Dec. 241], in which last case the court said: "We can not take into our consideration the property in New York; our statute is real, and, where the parties are not married here, can only act on property found in Louisiana; that which is in our sister state, will follow its laws." We regard it also as a well-settled principle of law that personal property has properly no other *situs* than the domicile of the owner, and that its disposition and transmission, by contract or inheritance, depends upon the law of the owner's domicile, saving rights acquired by creditors by means of attachment, or otherwise, before delivery or notice. As a general rule, we consider this as settled. We so recognized it in the case of *Oliver v. Towns*, 2 Id. 93.

A remarkable case, illustrative of this principle, was produced during the argument from Bouhier on the Customs of Burgundy, of a Florentine, who was domiciled in France during the civil

wars, and who remitted on deposit to Florence, his native country, a certain sum of money. He died in France, and his heirs there claimed the deposit. The depositary contested their right on the ground that, according to the laws of Florence, he was entitled to retain it as heir; but the tribunals decided in favor of the heirs according to the law of France: Bouhier, Coutume de Bourgoyne, 640. This doctrine is especially true of debts, which clearly, according to all the authorities, follow the person of the owner, or creditor: Story Conf. L. 362. A just application of these principles to the case now before us, solves the only question which it presents. During the life time of Mrs. Packwood she could not be considered as having any right in or title to the sugar, which was sold by William G. Hewes, although it may have been the fruit of property destined to be divided, as belonging to the community, upon its dissolution. It was sold before her death; it was disposed of by the agent of Packwood, who resided in New York as well as his wife; the proceeds constituted a debt due first by Hewes, the agent, and afterwards by the bank, as depositary, to Packwood. That it might have been attached or levied on as his property, at any moment before its transmission to New York, we have no doubt. It was, therefore, the property of Packwood in New York, the place of his domicile. The fund in the bank can not be identified with the sugar, even supposing the sugar to have belonged to the community, and the succession of Mrs. Packwood entitled to one half. It no longer existed in kind; it could no longer be identified; it had merged in a debt due by the Commercial Bank, according to the principles settled in the case of *Stetson & Avery v. Gurney*, 17 La. 162. It was due to her, and belonged to her at the place of her domicile, where she died, and not in Louisiana. Its distribution, or inheritance depends on the law of New York; and if Packwood be indebted for it to the estate of his wife, it is not due here, nor to be administered upon here as a part of the estate of Mrs. Packwood, but as composing a part of her succession in New York.

Whether we regard that fund, therefore, as belonging either to the husband, or to the wife, or to both, it was equally beyond the reach of our laws. It was subject to the controlling influence of the laws of their common domicile. In contemplation of law, it was not here at the time of the death of Mrs. Packwood. If, at that time, a crop raised upon property belonging to the community, had been on the place unsold, it may have been likewise common; but its proceeds in money, due first by

an agent, and next by a bank, to the husband residing in New York, can not, in our opinion, be put down as a part of the assets of the estate of Mrs. Packwood, in the hands of her executor in Louisiana, to be administered here.

But it is urged, that our laws must govern in relation to the disposition of property situated here; and article 483 of the civil code is cited, which declares that, "persons who reside out of the state can not dispose of the property they possess here, in a manner different from that prescribed by its laws." The case of *Senac's Will* is referred to as illustrating that doctrine: 2 Rob. 258. This last case refers wholly to dispositions *mortis causa*; and the court was called on to interpret the tenth article of the civil code, and to decide whether a will made here, the testator having become afterwards domiciled in France, and died there, was revoked by the subsequent birth of a child, according to the law of Louisiana, or whether it was to be governed by the law of France. We held that, although in general the effect of acts passed in one country to have their effect in another, is to be regulated by the laws of the latter country; yet, in relation to testaments and donations in prospect of death, this does not hold, where the testator or donor resided abroad, both when the act was executed and at the time of his death. But in the case now before us, the difficulty lies deeper. It is, that Mrs. Packwood did not possess this fund in Louisiana; if any part of it belonged to her, it was hers in New York, and the case is illustrated by that of *Hicks' Adm'r v. Pope*, 8 La. 554 [28 Am. Dec. 142].

In that case, the husband and wife resided in Louisiana, although married in Alabama, where the personal property of the wife, reduced to possession, becomes the property of the husband. The slave, which formed the object of that controversy, had belonged to the father of the wife, who died in Alabama, and she inherited; he was brought into this state, and remained in possession of the husband during his life. He did not get possession in Alabama, but here; and the court held, that the law of the domicile of the heir would govern, and that the wife acquired, by inheritance, according to the law of Louisiana. The court there said: "It has been long settled by the jurisprudence of this country, that, notwithstanding marriages may have been contracted in other states, the rights of the married persons, after being domiciliated in this, are governed by its laws, in relation to all property acquired during their residence here, so far, at least, as they have reference to acquets and gains, which

form the matrimonial community. If the husband and wife be placed in this category, and the first should acquire personal property by purchase in another state, it would perhaps, at the moment of acquisition, form a part of the matrimonial community, even before it was brought into the place of the domicile of the partners. This doctrine is a necessary consequence of the maxim adopted by eminent civilians, that '*in domicili loco, mobilia intelliguntur existere.*'"

Upon the whole, we conclude that the court erred in discharging the rule.

It is, therefore, ordered and decreed, that unless the heirs of Mrs. Alice Packwood pay one half of the debts of the community, as shown by the statement made by the executor, or place funds for that purpose in the hands of the executor, within sixty days after the notice of this decree, the executor proceed to sell, according to law, a sufficient amount of property to pay the same; and that the appellees pay the costs of both courts.

IF HUSBAND AND WIFE REMOVE AFTER THEIR MARRIAGE, their subsequent acquisitions, in the absence of an agreement to the contrary, will be governed by the laws of the country into which they remove: *Saul v. His Creditors*, 16 Am. Dec. 212; *Murphy v. Murphy*, 12 Id. 475, and note 478. A wife may claim acquets and gains made in Louisiana, although she was married abroad, and never came within that state: *Cole's Widow v. His Executors*, 18 Id. 241; *Dison v. Dison*, 4 La. 191.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

MAKIN v. SAVINGS INSTITUTION AT PORTLAND.

[23 MAINE, 350.]

SAVINGS INSTITUTION CAN NOT PROHIBIT THE WITHDRAWAL OF DEPOSITORS under a power in its charter to regulate such right by limiting its exercise to such reasonable time as the institution may appoint.

INSUFFICIENCY OF THE ASSETS OF A SAVINGS INSTITUTION TO PAY ALL OF ITS DEPOSITORS can not excuse its refusal to pay any depositor who seeks to withdraw his deposit, after proper notice required by the by-laws of the institution. The relation of partners does not exist between the different depositors.

RIGHT OF A SAVINGS INSTITUTION TO DIVIDE ITS PROPERTY among its depositors does not authorize it to refuse to pay a deposit because of the insufficiency of its assets to pay all deposits. The power can only be exercised after it has been decided by vote of the trustees to make such division of the property.

ASSUMPT. The opinion states the case.

Preble and Daveis, for the defendants.

Codman and Fox, contra.

By Court, SHEPLEY, J. It appears from the report and documents that during the years 1837 and 1838, Judith Makin deposited with the treasurer of the institution certain sums of money upon the terms and according to the regulations prescribed by it. The plaintiff proved his intermarriage with the person, who made the deposit, and that he had given notice of his intention to withdraw the money; and that at a subsequent time, and on one of the days designated for that purpose, he had demanded payment, which was refused. The defense presented was an inability to pay all the moneys deposited, arising out of

losses by which the value of the assets had been reduced fifty per cent. or more, without any neglect or fault on the part of the institution, or of its officers. Whether this can be considered a legal defense, must depend upon the contract between the parties; which is to be ascertained from the charter of the institution, and from its by-laws and regulations prescribed for making deposits.

The third section of the charter contains these words: "The principal of such deposit may be withdrawn at such reasonable times, and in such manner as the said society shall direct and appoint." The fifteenth by-law recognizes the right of the person making the deposit to withdraw it, and prescribes the times and manner of doing it. It contains, among others, these words: "Money deposited shall only be drawn out by the depositor, or by some person by him legally authorized; but no person shall receive any part of the principal or interest without producing the original book, that such payments may be entered therein, unless the trustees shall otherwise determine. No money can be withdrawn except on the third Wednesdays of January, April, July, and October; and one week's notice before the day of withdrawing must be given to the treasurer; and no sum less than ten dollars of the capital of any deposit shall be withdrawn, unless the whole sum deposited by such person shall be less than that amount." The twenty-third by-law states, "the act of making a deposit shall be considered a sufficient assent on the part of the depositors to the by-laws and regulations of the institution." The fourteenth by-law is: "All deposits shall be entered in the books of the corporation, and a duplicate shall be given to each depositor, in which the sum paid by him shall be entered, and which shall be his voucher and the evidence of his property in the institution." The regulations or terms, upon which deposits are to be made, are found in the duplicate book given to the person, who has made the deposit. The following statements are found among the regulations on the fourth and fifth pages of the duplicate book given to Judith Makin: "But people may become sick, or otherwise want their money, after they have put it in. It is provided, that they may take it out, when they please; but the days of taking it out are the third Wednesdays of January, April, July, and October; and they must give one week's notice before those days, that they intend to call for their money. The reason of this rule is this: If the money could be called for any day in the year, the trustees could not lend it out, or employ it to the advantage of those, who put it

in." "When moneys are called out, this book given to the depositor, must be brought to the office to have the payment entered. Persons may take out the money themselves, or in case of absence or sickness it will be paid to their order, properly witnessed and accompanied by the book."

Among other arguments presented in the defense, the plaintiff was met by one *in limine*, that it was not intended, that a person, who had made a deposit, should be legally entitled to withdraw the money against the will of the institution. And that it had not given an unconditional assent, that it should be withdrawn on certain days at the pleasure of the depositor. This argument is so obviously at variance with the language of the charter, by-laws, and regulations, already quoted, that it might be sufficient simply to refer to them. But as it seems to be derived by inference rather from the organization and design of the institution, than from the language alluded to, it may be useful to consider, whether these authorize any such conclusion. And whether such a construction would not be subversive of the design, and destructive of the objects, or some of them, intended to be accomplished. The declared designs as stated in the charter are, to enable the institution to receive "any deposit or deposits of money, and to use and improve the same for the purposes, and according to the directions herein mentioned and provided." And among the directions named in the charter are the following, "and the net income or profit thereof shall be by them applied and divided among persons making the said deposits, their executors, or administrators, in just proportions, and the principal of such deposit may be withdrawn at such reasonable times and in such manner as the said society shall direct and appoint." Does a proper and legal construction of this language permit the institution to make by-laws or regulations, which would prevent a depositor from withdrawing his money at all without its consent? Or does it only permit the institution to regulate the time and manner of doing it, leaving in other respects the decision of the question to the depositor's pleasure, whether it should or should not be withdrawn? Clearly the latter is the correct construction, and so the institution appears to have regarded it, and to have formed its by-laws and regulations accordingly. "The object of the institution (says the first by-law) shall be to provide a safe and profitable mode of enabling industrious persons of all descriptions to invest such part of their earnings or property, as they can conveniently spare, in a manner which will afford them both profit and

security." And the same in substance is repeated in the regulations. Nothing is said here respecting the time, during which it should remain invested; but the institution has itself declared it to be until "people may become sick, or otherwise want their money." It is not easy to make language state more explicitly, than the charter, by-laws, and regulations have stated, the design of the institution to be, to hold out inducements to the improvident and others to deposit something, which they could then spare, that it might be preserved and increased, and yet be in a condition to be recalled once in three months, and applied to administer relief to their necessities, when sickness or misfortune should come upon them, or when they should want it for other purposes. And it is not difficult to perceive, that the charter and the proceedings under it look to this as the great object to be accomplished. And to carry out that object and make the deposit available for such purposes, it is necessary, that it should be liable to be withdrawn at stated times at the pleasure of the depositor. And it would not be too much to say, that the object would be so nearly defeated by a different construction, that few deposits could have been expected from the class of persons, who were invited to deposit, if it had been the declared purpose of the institution not to give the depositor a perfect right to withdraw his money at his own pleasure on certain days designated and made known to him. And such a claim on the part of the institution now is in direct conflict with its statement to the depositors, "that they may take it out, when they please."

Another position taken in defense is, that the institution is to be considered as the trustee and the depositors as the *cestuis que trust*, and that the losses therefore fall upon them. That some or all of them must bear the losses, when the institution can not pay all, is undoubtedly true. And so must those persons, who have claims against any other corporation, which is in a like condition. But that the institution is to be regarded as assuming merely the responsibilities, which attach to a common trustee, who takes the money of the person to be benefited, and invests it for him, and accounts to him by delivering to him the money, or what remains after deducting losses, or the property, in which it has been invested, with its increase, can not be admitted. Such a trustee makes no engagement, and none is implied by law, beyond that of acting prudently and faithfully in preserving, investing, and restoring the property, or what may not be lost without his fault. Such a trustee could not present

the motives necessary to induce a deposit in a savings institution. Nor carry into effect the purpose of enabling the class of persons intended to be benefited to have their money placed, where it might be preserved and increased, and yet be returned to them whenever wanted to meet unexpected and necessitous calls. To present the motives and to accomplish the design held out by the institution, it was necessary, that it should assume additional and more onerous and responsible duties, than attached to a common trustee. Accordingly it is found, that the institution had undertaken to act in a different manner; and to assume liabilities of a peculiar character, and suited to carry into effect its special purposes. It proposed to proceed, not upon the well-known principles of a common trust, but upon a system of its own benevolent devising, by which it will receive and invest his money not alone and separate, as in common trusts, but with that of an unlimited number of others; that from all these investments it will obtain an interest, of which no exact part can be decided to belong to any one as accruing from his money; that it will at stated times pay out to him, not even his share of the whole interest earned, but a designated portion, only reserving, it may be, a residue; that it will pay him four per cent. or at that rate without any condition annexed, whether it has or has not earned it; that it will pay out not what may be found to belong to him upon an adjustment of profit and loss, but the sum deposited; and that it will not account with him by a delivery of the property in which his money may have been invested, but will pay it out as provided in the fifteenth by-law, which states, that "all moneys received by the treasurer shall be specie, or such bills as are received on deposit at the Portland banks, and all payments shall be made by him in the same manner."

It proposed to reserve the increase of interest, if any, over four per cent.; and this might operate as a compensation to the continuing depositors for any injury, which such a course might bring upon them. This was to be divided among those, who for five years might have been subjected to this process of paying out to one not precisely his own money or property, or its increase, but a certain interest and the full amount of his deposit in cash from the common fund of the institution. To this course the institution has pledged itself by its charter, by-laws, and regulations, and all the depositors have pledged themselves by the very act of making the deposit. And all the depositors in effect agree, that one, who pleases to call for his money may

receive it in full and in cash; and that they will look to the remaining funds for their rights. In all these particulars the rights and duties of the depositors and of the institution are different from those of common trustees and *cestuis que trust*. And well might it be said on a former occasion, that it assumed other and greater duties and liabilities, than those properly appertaining to a trustee. And it would seem, that their obvious character might have operated as an excuse for omitting to set them forth at large. And the corporation having assured, and repeated the assurance, as has been seen, that the depositors might take out their money on certain days, when they pleased, without annexing any condition, or requiring any adjustment of accounts, or losses and gains, it might be said with perfect accuracy, that it did in effect assume the whole risk of losses, for it undertook at all events to pay a stipulated interest, and to repay the principal sum. But it is said by one of the counsel, that this can not be correct, for the seventh by-law provides, that "the trustees of this institution shall receive no emolument therefrom, and while engaged to a conscientious and upright discharge of their duties, they are not to be held responsible for any losses, which may happen from any cause whatever, except their willful and corrupt misconduct." The error lies in considering the trustees as personally assuming to perform the engagements of the institution. While this argument as presented by the other counsel is, that the by-law is applicable to the corporation itself, excusing it from the risk of losses. And that by "some confusion of ideas" the trustees were named, when the corporation was intended. The by-law, however, is neither of doubtful meaning nor obscure. The design was not to provide a protection for the corporation against losses, which it did not seek, except in one event to be hereafter noticed. But it was to protect the persons who might be trustees from being called upon to make up losses, as is clearly shown by the following provision in that by-law; that "those trustees only, who may be concerned in such misconduct, shall be answerable for the same."

It was also asserted in argument, that the funds of the institution were to be considered as a partnership fund. And it was proposed to apply the law applicable to partnership property to regulate the rights of all interested. But the doctrines of that law can have no proper application to this case. There is no union of interests or of rights between the plaintiff and the corporation. On the contrary, they are separate and distinct. They depend upon mutual stipulations, but the share of them

undertaken by each is different. And if the several depositors can in any other sense, than as interested in the same fund, be considered as partners, they have consented by the act of making their deposits, as before noticed, that each may, according to the regulations, withdraw his money. And have done this without any limitation or condition, that there should first be an adjustment of profit and loss. To have waited for such an adjustment in each case before payment would have been so vexatious and impracticable, as to be destructive of all the benevolent purposes of the institution. The results promised from the ordinary action of the institution, as declared in the by-laws and regulations made by it and assented to by all the depositors, may, at the expense of a repetition, be stated in the very language of the institution; and thus stated they are; that "twice every year, namely, on the third Wednesdays of July and January, a dividend or payment of interest of two per cent. or two dollars on a hundred will be made;" that "although four per cent. is promised yearly, yet every fifth year all the extra income, which has not before been paid out and divided, will then be divided in just proportion to the length of time the money has been in according to the by-laws;" that "people may become sick, or otherwise want their money, after they have put it in; it is provided, that they may take it out, when they please; but the days of taking it out are the third Wednesdays of January, April, July, and October." These are engagements, among others, which the institution has entered into with its depositors, and they are not accompanied by any condition or limitation, or made to depend on any contingency, so far as it relates to its ordinary action. And without their being carried into effect the design of the institution could not be accomplished. It would be defeated. If the institution by its regulations and offers has undertaken more, than it finds itself able to accomplish, it is only in a position, which is often the result of human arrangements. No blame necessarily attaches to it, or to those by whom its affairs have been managed. It could not be expected to have provided against losses, which might have fallen upon the most wise and prudent. And it may well be excused, if it has been seduced by a desire to benefit the improvident, to propose to confer a greater benefit, than it was able to do, under the state of things, which has happened.

All this, however, can afford no legal protection against the performance of all, which it has undertaken to perform. If it can not pay all, it must do what it can to fulfill its engagements,

and pay in conformity to the requisitions of the laws, which govern other corporations and persons. And it can not justly complain, if the course may be the same as in many, if not most other cases under our laws, that its effects are distributed unequally. Especially as it reserved to itself the power to provide for such an extraordinary contingency as has happened in a manner, that might have secured an equal distribution. This is done by the twenty-second by-law, which says: "The trustees may by a vote of the major part of the whole number, at any time divide the whole of the property among the depositors in proportion to their respective interests therein, upon giving three months' notice thereof; and shall also for the like purpose be at liberty to refuse to receive any deposit at their pleasure." This appears to be the only provision made to change the ordinary action of the institution into an extraordinary one. And until the institution has acted under it, the rules and responsibilities of its ordinary action are binding upon it. The institution in the year 1838 declined to receive any more deposits, and authorized the treasurer to pay to any depositor the full amount of his deposit "in any of the bank stock held by the institution at the cost." And it afterward, in consequence of losses, voted, that the by-laws requiring semi-annual dividends be suspended. But it has never proceeded to divide the whole of the property among the depositors according to their respective interests therein. If the trustees, before the commencement of this suit, had determined by a regular vote, under that provision of the by-laws, to divide the whole property, an equal distribution might have been secured by the common consent of all the depositors, expressed by their assent to the by-laws. And all the depositors having consented, that each on the days named should withdraw his deposit at pleasure to be paid out in cash, they can have no just cause to complain that their interests are limited to the *residuum*, unless they should think, that the institution unnecessarily neglected to interpose under the twenty-second by-law to prevent its being governed by the regulations for its ordinary action; and to place it under regulations better suited to its present condition. The legal rights of the parties now before the court can only be considered; and there is no legal defense presented.

WHITMAN, C. J., took no part in the decision.

The case that next follows in the original report is that of *Savings Institution v. Makin et al.* That was a bill in equity filed by the trustees of the institution, alleging that the property of the institution had greatly depreciated

in value in past years, whereby it had become impossible to pay more than sixty per cent. to the depositors of the amount deposited by them. That the loss of forty per cent. which must be visited upon the depositors should, in equity, be equally apportioned among them; that certain depositors threatened to prevent such an equitable apportionment, having begun suits at law to recover the amount of their deposits. The bill prayed for an injunction against the further prosecution of these suits, and that this court should proceed to an equitable distribution of the assets of the institution among its depositors. This bill was filed in the name of the trustees of the corporation, and not in that of the corporation itself, and the court was inclined to think that there arose from this a want of proper parties; waiving this consideration, however, it proceeded to discuss the question, whether, upon general principles of equity, it could give the relief sought; and decided that it could not. The corporate body, by the charter of incorporation of the institution, consisted of certain persons named therein, and it was further provided "that they, and such others as may be duly elected members of said corporation, as in this act is provided, shall be and remain a body politic and corporate forever."

In one aspect of this bill it was an attempt by the trustees to obtain the court to execute the trust accepted by them. Now, though it might be proper to supersede a trustee at the instance of a *cestui que trust* alleging mismanagement, yet the court would not, at the request of the trustee, do that for him which he might do or have done himself. And such is this case, since the twenty-second by-law of the institution provided for a distribution of the assets, as will appear by a reference to the principal case, and might, if the power thereunder had been exercised, have avoided this difficulty. The court further disclaimed any power to sequester the funds of a corporation, and to deprive it of them, and to dispose of them as it might deem just and equitable among those beneficially interested. The court again denied that the relation between the corporation and its depositors was that of trustee and *cestui que trust*, though such was the relation between the trustees of the institution and the depositors, and therefore denied that it could interfere by reason of its jurisdiction in cases of trust. It therefore refused the relief sought. The court then discussed what alteration was made in the law by the act of March 18, 1842, but into this part of the case it is not necessary to go far. It is merely necessary to say that the act provided that the court could order the sequestration of funds in cases similar to the present, but that it respected the right of all persons who, having sued the corporation, had obtained verdicts before a bill filed by the trustees of the corporation, to obtain the sequestration of its assets, and that the validity of this proviso was upheld by the court, and that therefore Makin, the plaintiff in the principal case, still remained entitled to payment of his deposit in full.

FAIRFIELD v. PAINE

[23 MARCH, 498.]

RETURN OF SERVICE OF A WRIT BY AN OFFICER is, where a return is required by law, the only proper evidence of what has been done by him thereunder, and no omission therein of any fact may be supplied by other proof.

NO INTENDMENT OF THE TIME OF SERVICE IS MADE IN AID OF THE RETURN OF SERVICE.—Of two writs served on the same day, one of which shows the exact time of day when the service was made, the second only the day, the former will be given precedence to the latter, as no intendment can be made that the latter was served before the hour mentioned in the first return of service.

AMENDMENT TO A RETURN OF SERVICE THAT MAY AFFECT THE RIGHTS OF THIRD PERSONS can only be allowed where something appears of record by which the correction can be made. Thus where one party claims under a writ of execution returned as served at noon of a certain day, an amendment can not be allowed of a writ returned merely as served upon the same day, so as to cause the same to appear as served before the first writ, where nothing appears in the record to indicate the time of service.

Writ of entry. Demandants claimed under a writ of execution issued against Ansel Gerrish, on a judgment recovered against him by John Trafton, and which appeared by the return of service to have been levied upon the real estate in controversy on the seventeenth day of May, 1836. Defendant acquired title under an execution issued upon a judgment obtained against the said Gerrish by one Gowen, and which, from the return of service, appeared to have been levied upon the property also on May 17, 1836; but the return further specified at one second past twelve o'clock of the said day. During the pendency of the action, the judge of the court below, in which the judgments against Gerrish had been obtained, gave leave to amend the return on the first writ, and in accordance with this leave the writ was amended so as to cause it to appear that it had been levied upon the property in dispute before noon on the seventeenth of May, 1836. The above facts were submitted to this court to be acted upon in the same manner as if they had been found by special verdict. The other facts appear from the opinion.

Fairfield and Haines, pro se.

Shepley, for the tenant.

By Court, TENNEY, J. By the return on the writ against Gerrish in favor of Gowen, the attachment of the land in controversy was made one second after twelve o'clock on the seventeenth day of May, A. D. 1836. The original return of the attachment of the same land, upon the writ in favor of Trafton against Gerrish, showed that it was made upon the same day as the other, without designating the precise time in the day. As the returns were, before the amendment of the latter, what was

the interest of each party in the land by virtue of the levies under which they respectively claim?

When the evidence of the official doings of those authorized to make service of writs, is required to be in their returns, the parties to the precept or process, and those holding under them, are conclusively bound thereby. Everything which the officer is required to do in making such services must appear affirmatively, by this species of evidence. There can be no presumptions short of necessary inferences, which can supply omissions. Hence, in the return of an extent upon real estate by virtue of an execution, if the officer omits to state by whom the appraisers were chosen, the return would be so defective that the creditor could acquire no rights thereby; notwithstanding he might be able to show conclusively by other evidence, that there had been a perfect compliance with the requirements of the statute. In the return of service upon mesne process, if the officer should omit the date, unless this defect should be cured by an amendment, or by some act of the defendant therein, a judgment rendered in that action would be erroneous, as the return would furnish no evidence, that there had been legal notice to him. The demandants contend, that a fair and liberal construction of the return upon Trafton's writ, as it was when first made, would be, not that the land was attached at the earliest or the latest possible moment of the day, but at a moment equally removed from their extremes, which would be at noon. To admit the correctness of this proposition would establish the principle, that all attachments which in the return thereof have no date of the hour or minute when made, must be presumed to be made at noon, which no one will contend is generally the fact. A consequence arising from this would be, that an attachment made and so returned at the earliest time, after noon, would be postponed to one made at the latest moment of the same day, if the precise time was omitted in the return of the latter. And this presumption, which it is contended will arise, is equal to the most conclusive positive proof, as no evidence to affect a return of an officer of his doings in such a case can be adduced.

An officer making an attachment may know the precise moment when it is made; it is the privilege of a creditor to have this appear upon the return. If it be omitted to his prejudice, when required to be made, the officer is liable. But if all attachments without a more particular date than that of the day, are to be considered as made at noon, the rights of the vigilant creditor,

who causes one to be made after that time, however early, and the return shows the precise moment, are to be surrendered to the one coming after him, who takes no measures to have the hour designated; and the former is remediless, for the officer, who made his attachment, has done his whole duty, and the other has made no false return. In returns of officers, nothing is to be presumed in reference to dates, more than any other fact. A creditor has the advantage of no time earlier than that which is so expressed, as to exclude one which is later. In order to hold the property returned on another writ, it is not enough that he should show, by the return, that it may have been, but that it certainly was earlier than the attachment upon the former. The attachment was made on Gowen's writ at a fixed and certain time. That upon Trafton's, according to the return when first made, is not affirmatively shown to be at a time so early. The former must take precedence of the latter.

Assuming, that the amendment of the return upon Trafton's writ was made in pursuance of an order of the district court, where the record was, which is denied, can that amendment affect and change the rights of the parties now before us? The party to be prejudiced thereby is not the debtor in Trafton's execution, but the grantee of another creditor, who we have seen derived a perfect title as against the demandants, by his attachment upon the writ followed by a seasonable levy upon the execution.

It is insisted by the demandants, that the amendment was allowed in the exercise of a discretion, and therefore is not subject to revision by any other court. It is true, that many amendments may be allowed by a judge of the district court, or by a judge of this court while sitting alone, which on consideration may appear of doubtful expediency, but if they were permitted in the legal exercise of a discretion, their propriety can not be questioned on exceptions. But if the amendment is one, which the law does not authorize, it is otherwise; and the demandants are not understood as controverting this proposition. An amendment in a return of an officer, beyond the legitimate power of a court to permit, in the exercise of a discretion, can not take away the rights of third persons, which were perfected before any alteration took place in the return as first made. If in the trial of an action in the district court, such an amendment should be allowed, the party sought to be injuriously affected thereby objecting, and the case should be carried up by exceptions or appeal, the legal propriety of such an amendment and the effect thereof could certainly be considered and determined

by the appellate tribunal. A contrary doctrine might leave to the aggrieved party a right of appeal, but would allow the court appealed from, to change entirely the evidence first presented, so that the character of that evidence, and the right to change it to the prejudice of either party, could not be revised. In *Emerson v. Upton*, 9 Pick. 167, the court say: "We do not interfere with the rights of the court of common pleas to allow the officer to alter his return; from the evidence on which that court acted, we presume they had sufficient ground to be satisfied that the attachment was made on the sixth of March. But they did not decide on the effect of the amendment, nor could they, so as to bind this court upon any question arising out of the proceedings, which might affect the rights of third persons."

Cases bearing upon this question, decided in this state, Massachusetts, and New Hampshire, have been cited. And the rule, which may be extracted from them, on the subject of allowing officers to amend their returns upon writs and executions so as to affect the interest of third persons, whose rights had been previously acquired, seems to be well established; if there is any difficulty it is in its application. "Such amendments can be allowed only where there is something upon the record, by which the correction can be made, and in such cases there can be no difficulty:" *Thatcher et al. v. Miller*, 13 Mass. 270. "When the subsequent purchaser or creditor, being chargeable with constructive notice, of what is on the record, if he has sufficient to show him, that all the requirements of the law have probably been complied with, and he will, notwithstanding, attempt to procure a title under the debtor, he should stand chargeable with notice of all the facts, the existence of which is indicated and rendered probable by what is stated in the record, and the existence of which can be satisfactorily shown to the court:" *Whittier v. Varney*, 10 N. H. 291. In the cases cited in the argument, unless the party, moving that an amendment may be made, or seeking a right by virtue of such, has brought himself within these principles, the amendment has been refused, or if made, it has not been permitted to prejudice the rights of third persons, previously obtained.

Was there anything upon the record in *Trafton's Case* from which the amendment could be made? Or was there anything therein which could be a notice to Gowen before his levy, or to the tenant, Paine, before his purchase, that it was probable, that the attachment upon Trafton's writ was made at an earlier time than one second after twelve o'clock on the seventeenth

day of May, A. D. 1836? The date of the return was as specific as appears in a very large majority of cases; it was perfect in itself, there being nothing indicative of any positive error or accidental omission. The fact that the service was made on the first day of service for the next succeeding court, does not impress us as having a tendency to render it probable that the attachment was made before noon of that day, or that the date was not as particular as was intended. The omission of the precise time of making the attachment, in the return, is nothing from which an amendment can be made. If it were so in this case, it would be the same in all, where the year, the month, and the day make the only date. Could one be aided in the least, in ascertaining the time of day, when the numerous writs on the files of this court were served, by an examination of the returns, where the precise time is not expressed? It is difficult to perceive how the omission to state that, which is not usually stated, and which is not required to constitute evidence of a legal service, and which implies no mistake, can enable the officer, who made the service, to state the exact moment, when it was made. Many circumstances, independent of the record, may call to his mind the time of day when he made his attachment, but unless the record discloses something, from which the addition can be made, the rule forbids the amendment.

If there was nothing upon the record, which could aid the officer in making the amendment, it follows that there was nothing therein rendering it probable to the mind of another attaching creditor or purchaser, that there was an omission of that, which if supplied, would entitle the creditor in that suit to hold by the attachment. But there is that upon the return itself, which renders it very remarkable that the exact time should have been omitted, if the attachment was made at the earliest time after the commencement of the seventeenth day of May, A. D. 1836. It was not a case where an officer had nothing to do but to sit down at his table in his own room, and make a return or a memorandum of an attachment of real estate, which may be done without going upon the land; but the officer in this case must have actually gone to the spot, where lay fifty thousand of boards, which he states in his amended return he attached and delivered to the creditor, at the earliest possible moment after the sixteenth of May. If it was then thought so important, that the service should be made about the hour of midnight, and the minute and the hour were entirely omitted in the return, it implies such a degree of forgetfulness or want

of care in the officer as to render it somewhat hazardous, to permit the rights of third persons to be taken away by an amendment made from his memory three or four years afterwards. No case has been referred to, in which an amendment has been allowed to prejudice the rights of third persons where the record did not give stronger indications of omission or mistake than the one in question.

It has always been the policy of the law, that the title to real estate should rest upon that evidence which can not mislead, and which should remain unchanged by time; that it should not depend upon the frail recollection of honest men, or the false testimony of dishonest men. The statute of frauds and our laws of registration of titles to real estate are universally approved. In consequence of them, the right which has been fairly acquired, is not liable to be defeated. If a register of deeds could be allowed to make an alteration in, or an addition to the date, showing when a conveyance was recorded, years afterwards, from his memory, which he might honestly suppose did not mislead him, and thereby change essentially the titles, which were evidenced by the records, the registry would be but an imperfect security. And it is certainly no more important that such records should be exempt from the mutilation which would essentially change rights, than those which are made by other officers who are intrusted with the responsibility of fixing titles, by their returns upon judicial precepts.

It is presumed that the amendment in the case in question was made in perfect good faith, by all who had an interest therein; but to allow it to have the effect which is claimed by the demandants, would take away the rights of the tenant fairly acquired, and overthrow the doctrine which has here for a long time been entirely settled.

The demandants must become nonsuit.

AMENDMENTS TO RETURNS OF WRITS.—This question is fully discussed in the note to *Malone v. Samuel*, 13 Am. Dec. 173-181. See, also, *Freeman v. Paul*, 14 Id. 237; *Crocker v. Mann*, 26 Id. 684; *Barnard v. Stevens*, 16 Id. 733; *Heflin v. McMin*, 20 Id. 58; *Dewar v. Spence*, 30 Id. 241; *Berry v. Griffith*, 18 Id. 309; *Barkeloo v. Randall*, 32 Id. 46.

HERSEY v. VEAZIE.

[34 MAINE, 9.]

STOCKHOLDERS OF CORPORATION CAN NOT, WITHOUT ITS CONSENT, legally obtained, bring suit in equity to compel its officers and agents to account and make settlements with them, for moneys of the corporation received by such officers and agents.

WHERE AGENTS OF CORPORATION HAVE ACTED FRAUDULENTLY TOWARDS IT, the wrong is primarily committed against the corporation, and until it is shown that the corporation is incapable of granting redress to its stockholders, or that it improperly and collusively refuses to do so, they can not bring suit to redress the wrong.

WHERE DEBTOR TRANSFERS SHARES IN CORPORATION TO HIS CREDITOR, the latter agreeing "to account for the said shares, or reconvey them," the former has no such interest therein as will enable him to maintain a suit in equity to compel the corporation to account to him for the profits or property.

BILL in equity. The opinion states the case.

Everett and Groton, for the plaintiffs.

Kent, for the defendant.

By Court, SHEPLEY, J. When this bill was filed by Ira Hersey, Samuel Veazie and Alfred J. Stone were made parties defendant. After they had filed their answers, the plaintiff discontinued as to Alfred J. Stone, and asked leave to amend his bill, and to make John Coburn, as the executor of Jonathan Baker, deceased, a party plaintiff. Leave was granted upon terms, and the executor of Baker became a party. Instead of amending the bill by inserting his name, with averments suited to present properly the claims of both the plaintiffs, a separate paper has been presented, containing a reference to the motion for leave to amend, as if that had some connection with the bill, and a reference also to the answer of Veazie, as if that could be properly noticed in an amended bill, or regarded as an answer to it in its amended form. Since leave to amend was granted, the proceedings have been very informal and irregular. The defendant has filed a demurrer to the most material portions of the amended bill, which by consent has been argued without regard to the form, in which the allegations made by the present plaintiffs have been presented. Stripped of their formal parts the material allegations, contained in the papers presented as a bill, are in substance: that the proprietors of the booms in Androscoggin river were constituted a body corporate; that the property of the corporation was represented by thirty-six shares; that

James Rogers formerly owned eight of those shares, and on March 21, 1823, conveyed the same to Jonathan Baker, who on June 25, 1828, executed an instrument in writing "agreeing to account for the said shares or reconvey them, when he should have realized therefrom the amount of a note for nine hundred and thirty dollars, due from the said Rogers to said Baker, and other demands in said instrument alluded to," as stated in the bill; that after Rogers had conveyed those shares to Baker, he conveyed or assigned all his right to them to the plaintiff Hersey; that from the year 1825, to the year 1831, the defendant was the collector of tolls, treasurer, and sole agent of the corporation, to prosecute and defend suits; that during all that time the booms were under his care and management, whereby he became possessed of a large amount of the funds of the corporation, for which he has rendered no account; that by the purchase of shares and by obtaining proxies from other shareholders, he obtained the control of a major part of the shares and of the corporation; that during the year 1829 he fraudulently caused certain actions at law to be commenced against the corporation in his own name and in the names of other persons, and collusive judgments to be obtained in them by his consent as agent of the corporation, and that with intent to defraud the other shareholders he thereby caused the franchise of the corporation to be sold and received the pay therefor; that he ought to render an account and pay over to the plaintiffs their proportions of the sums of money by him received for tolls and otherwise, and of the amount received for the sale of the franchise; and that he has obtained possession of the books and papers of the corporation and refuses to permit the plaintiffs to have access to them. The prayer is in substance, that an account may be taken; that the books and papers of the corporation may be produced; and that he may be decreed to pay to the plaintiffs their proportion of the funds of the corporation in his hands.

There is no allegation in the bill, that the corporation has been dissolved, or any facts stated, from which such an inference could be justly drawn; or that it has refused to call upon the defendant to account; or that it has acted collusively with him except as represented by him as agent. And although it is alleged, that he had obtained a control of the corporation by proxies and purchase, there is no allegation, that a corporate meeting could not be obtained. And by our law, the minority of the shareholders may cause a meeting of a corporation to be called; and those, who had given proxies to the defendant, could at any

time have voted upon their own shares, or have revoked their proxies and caused their shares to be represented by the agency of other persons. It is not alleged, that he held a majority of the shares in his own right, and thereby prevented the corporation from passing any vote to call him to account with it. It does not therefore appear from the allegations, that the corporation had not the power and the disposition to settle with its collector and treasurer and agent, according to its own pleasure; unless it may be inferred from the delay to do it. This can not be inferred from mere delay, especially when there does not appear to have been any effort made by the holders of these eight, or the holders of any other shares, to have a meeting of the corporation called for such a purpose; and when, from aught that appears in the bill, there may have been directors or trustees of the corporation, with power to have made an adjustment with the defendant. As this bill is presented, the plaintiffs assume the right, which no member or members of a body corporate have or can have without its consent legally obtained, to call its officers and agents to account with them, and to make settlements and adjustments with them. If the defendant should settle his accounts with the plaintiffs, the corporation would not be bound by it; nor would any payment made to them be good against the corporation. Nor can the plaintiffs by the interposition of a court of equity accomplish such an object; for the court could not rightfully assume the control of the corporation, and exercise its rights in this respect, without its being a party to the suit, and having an opportunity to justify its own course of proceeding. If the defendant, as agent of the corporation, acted fraudulently toward it, obtained fraudulent judgments against it, and on them made a fraudulent sale of its franchise, these were wrongs primarily committed against the corporation. And until it has been shown to have been incapable of doing it, or to have been faulty, no corporator can assume its right to obtain redress for such wrongs, and to settle for them with the person, who has committed them. If the plaintiffs have been injured by these fraudulent acts, they should have taken measures to have the corporation obtain redress for them, and through its action have obtained their own redress. If after proper exertions made it had been found incapable of doing it, or had improperly or collusively refused to do it, they might perhaps have obtained redress by making it a party defendant. Without the corporation being made a party, that an adjustment of all these alleged grievances might be made, between those having

competent authority, it would be improper for the court to proceed and compel the defendant to make a settlement, which could not be conclusive upon its rights: *Robinson v. Smith*, 3 Paige, 222 [24 Am. Dec. 212].

Nor can the bill be sustained on the allegations respecting the books and papers, because it would be to no good purpose to compel their production, when they could not be used to produce any final result. Nor does it appear, that it can be useful to the plaintiffs to retain the bill and permit another amendment, to have the corporation made a party; as it would seem to be probable from the allegations made in the bill, that the proper measures had never been taken, or the proper proceedings had, to enable them to make the corporation properly a party. There is another difficulty to be encountered. The bill is now multifarious. The plaintiff, Hersey, can have, according to the bill, no right to call upon the defendant or upon the corporation, should it be made a party, for any dividend of profits or property. Baker was the sole owner of the eight shares, so far as the corporation and its officers and the other shareholders were concerned. He alone could receive any money, which might be payable to the owner of them. Hersey does not stand in the relation of assignee of a mortgagor to Baker or his executor. The contract from Baker to Rogers appears to have been made more than five years after the shares had been conveyed to him, and it is stated in the bill to have been an agreement "to account for the said shares or reconvey them." It was therefore at his option to account for them; and Hersey could not have claimed a reconveyance, or an account of the property or profits received for them, upon a tender of the amount due from Rogers to Baker. All that he could claim of him was to account to him for their value. His claims, if any he have, are only upon the estate of Baker, and not upon the corporation, or its funds.

The demurrer is allowed, and the bill dismissed with costs.

WHEN STOCKHOLDERS MAY MAINTAIN SUITS AGAINST OFFICERS AND AGENTS OF CORPORATIONS TO CALL THEM TO ACCOUNT OR TO SET ASIDE THEIR ACTS.—At law, the directors of a corporation are not liable to the stockholders for their mismanagement of the concerns of the corporation: *Thompson on Liability of Officers and Agents of Corporations*, 352, 379; *Smith v. Hurd*, 12 Metc. 371; *Smith v. Poor*, 40 Me. 415; *Allen v. Curtis*, 26 Conn. 456; *Faurie v. Millaudon*, 3 Mart. (N. S.) 476. In courts of law there is considered to be no legal privity between the shareholders and the directors. The corporation is regarded as having a separate existence as a distinct person in law, in whom all the property of the corporation is vested,

and to whom all its officers and agents are responsible for all torts and injuries diminishing or impairing it. "A court of law turns a shareholder out of its doors when he sues the directors for a breach of their official duty, on the ground that they are not *his* officers, but the officers of the artificial body, the corporation:" *Thomp. on L. of O. and A. of Corp.* 352. And, indeed, as long as the officers and agents of a corporation are faithful to their trust, the individual stockholders are not permitted, either at law or in equity, to interfere with their management of the corporate affairs.

In the case of *Kennebec & P. R. R. Co. v. Portland & K. R. R. Co.*, 54 Me. 181, Danforth, J., delivering the opinion of the court, said: "So long as the corporation is faithful to its trust, the stockholders, as individuals, have no occasion and no right to resort to, or enforce any remedies, legal or equitable, to vindicate any injury to the corporate property. When it is guilty of a breach of trust, then, and only then, the relationship of the stockholders, arising from that trust, gives them a right to pursue the proper remedy to vindicate their rights." And even in equity it is a general rule that a suit brought for the purpose of compelling the officers and agents of a private corporation to account for a breach of official duty, or for misapplication of corporate funds, must be brought in the name of the corporation, and can not be brought in the name of the stockholders: *Ang. & Ames on Corp.*, sec. 312; *Brown v. Vandyke*, 8 N. J. Eq. 795; *Smith v. Poor*, 40 Me. 415; *Cogswell v. Bull*, 39 Cal. 320; *Deaderick v. Wilson*, 8 Baxter, 108; *Forbes v. Whillock*, 3 Edw. Ch. 446. But in equity it is a well-established doctrine that the directors of a corporation are trustees for the stockholders, and, therefore, courts of equity will entertain bills brought by shareholders against directors to obtain relief against frauds and breaches of trust committed by them in the management of the corporate property.

The jurisdiction in such cases is based upon the grounds of fraud or trust, coupled with the fact that there is no adequate remedy at law. A court of equity will never permit wrongs to go unredressed merely for the sake of form, and where the corporation, for any cause, refuses to bring suit to redress injuries inflicted upon the stockholders by the managing agents or officers, the stockholders, who are regarded as the real parties in interest, will be permitted to file a bill in their own names, making the corporation a party defendant: *Ang. & Ames on Corp.*, sec. 312; *Thomp. on L. of O. and A. of Corp.* 385; *Salomons v. Laing*, 12 Beav. 339; *Gregory v. Patchett*, 33 Id. 595; *March v. Eastern R. R. Co.*, 40 N. H. 548; *Ryan v. Leavenworth, A. & N. W. R. R. Co.*, 21 Kan. 365; *Butts v. Wood*, 37 N. Y. 317; *Greaves v. Gouge*, 69 Id. 154; *Colquitt v. Howard*, 11 Ga. 556; *Brown v. Vandyke*, 8 N. J. Eq. 795; *Hodges v. New England Screw Co.*, 1 R. I. 312; *Hazard v. Durant*, 11 Id. 195; *Deaderick v. Wilson*, 8 Baxter, 108; *Wilcox v. Bickel*, 11 Neb. 154; *Peabody v. Flint*, 6 Allen, 52; *Robinson v. Smith*, 24 Am. Dec. 217; *Waring v. Catawba Co.*, 2 Bay, 109; *Dodge v. Woolsey*, 18 How. (U. S.) 331. In the case last cited, which is a leading one on this subject, Mr. Justice Wayne, delivering the opinion of the court, said: "It is now no longer doubted, either in England or the United States, that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capital or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchise of a corporation, if the acts intended to be done create what is in law denominated a breach of trust. And the jurisdic-

tion extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law."

In the recent case of *Hawes v. Oakland*, 104 U. S. 450, the question of the right of a stockholder to maintain a suit, in his own name, against the officers and agents of a corporation, was very ably discussed by Mr. Justice Miller, who delivered the opinion of the court. After considering the doctrine of the courts of equity in this country and in England, he said: "We understand that doctrine to be, that to enable a stockholder in a corporation to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist, as the foundation of the suit: Some action, or threatened action, of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization; or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders; or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders; or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity. Possibly other cases may arise in which to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases. But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted, in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a cause, if this is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors and of the shareholders, when that is necessary, and the cause of failure in these efforts, should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since, by operation of law."

WHERE THE CORPORATION FAILS OR REFUSES TO BRING SUIT, it is an indispensable party to the proceedings, and should be made a party defendant: *Thomp. on L. of O. and A. of Corp.* 393; *Greaves v. Gouge*, 69 N. Y. 154; *Davenport v. Dows*, 18 Wall. 626; *Charleston Ins. Co. v. Sebring*, 5 Rich. Eq. 342; *Samuel v. Holladay*, 1 Woolw. 400; *Deaderick v. Wilson*, 8 Baxter, 108. The failure or refusal of the corporation itself, upon demand made upon it,

to seek redress, is a condition precedent to the right of a stockholder to sue in his own name: *Thomp. on L. of O. and A. of Corp.* 385; *Dannmeyer v. Coleman*, 9 P. C. L. J. 281; *Hawes v. Oakland*, 104 U. S. 450; *Huntington v. Palmer*, Id. 482; *Brewer v. Boston Theater*, 104 Mass. 378; *Greaves v. Gouge*, 69 N. Y. 164; *Kennebec & P. R. R. Co. v. Portland & K. R. R. Co.*, 54 Me. 173; *Cogswell v. Bull*, 39 Cal. 320. And, therefore, a complaint which fails to allege that the corporation, on request, has refused to bring the proper action, is bad on demurrer: *Foss v. Harbottle*, 2 Hare, 461; *Mosley v. Alston*, 1 Phil. 790; *Hawes v. Oakland*, 104 U. S. 450. But where the corporation is shown to be under the control of the persons who must be sued, and that a demand upon them would be useless, the suit may be brought by the stockholder without showing such request and refusal: *Ang. & Ames on Corp.*, sec. 812; *Heath v. Erie R. Co.*, 8 Blatchf. 347. And an averment that the present board of directors openly connived at the fraud and approved of the transaction sought to be impeached, is sufficient excuse for not applying to them: *Thomp. on L. of O. and A. of Corp.* 385; *Heath v. Erie R. Co.*, 8 Blatchf. 347; *Mussina v. Goldthwaite*, 34 Tex. 125; S. C., 7 Am. Rep. 281. But an allegation in a bill against a corporation that the board is composed "nearly if not entirely" of the same persons that committed the wrong complained of, is insufficient as an excuse for not applying to them before bringing suit, as it presents no issuable fact: *Cogswell v. Bull*, 39 Cal. 320.

ALL STOCKHOLDERS NOT MADE DEFENDANTS OUGHT TO BE JOINED as plaintiffs, if practicable; but where they are so numerous as to render this impossible or very inconvenient, one or more of them may file a bill in behalf of himself and all others standing in the same relation: *Menier v. Hooper's Telegraph Works*, L. R., 9 Ch. App. 350; *Robinson v. Smith*, 24 Am. Dec. 212; *Thomp. on L. of O. and A. of Corp.* 392. And a stockholder may maintain a bill in his own name, without suing on behalf of other persons as well as himself, to restrain the corporation from doing acts that are *ultra vires*: *Hoole v. Great Western R. Co.*, L. R., 3 Ch. App. 262; *March v. Eastern R. R. Co.*, 43 N. H. 515. In *Baldwin v. Canfield*, 26 Minn. 43, it was decided that stockholders of a corporation might bring suit to remove a cloud from the title to real estate belonging to the corporation.

SHAREHOLDERS MAY LOSE THEIR RIGHT to relief by unreasonable delay in asserting it: *Thomp. on L. of O. and A. of Corp.* 391; *Gregory v. Patchett*, 33 Beav. 595; *Peabody v. Flint*, 6 Allen, 52.

GILPATRICK v. HUNTER.

[24 MAINE, 18.]

RELEASE OF ONE OF SEVERAL JOINT TRESPASSERS DISCHARGES ALL OF THEM.

TRESPASS for breaking the plaintiff's wagon, tearing his clothes, and injuring his person. The suit was commenced against the present defendants and Seth Leonard. The presiding judge ruled that the receipt referred to in the opinion operated as a discharge of Leonard only. The plaintiff then discontinued his action against Leonard, and proceeded against the others.

The jury found for the plaintiff, and the defendants filed exceptions. The other facts appear from the opinion.

E. B. Bowman, for the defendants.

S. Moody, for the plaintiff.

By Court, SHEPLEY, J. The plaintiff commenced an action of trespass against the defendants and Seth Leonard, for a joint trespass committed upon his person and property. He afterward received of Leonard five dollars "in full of said Leonard's trespass, where he and Wilson P. Hunter were in company, together with others." The question presented is, whether this operated to discharge the other joint trespassers. In a joint trespass, or tort, each is considered as sanctioning the acts of all the others, thereby making them his own. Each is therefore liable for the whole damage, as occasioned by himself, and it may be recovered by a suit against him alone. There can be no separate estimate of the injury committed by each and a recovery accordingly: *Brown v. Allen*, 4 Esp. 158; *Wynne v. Anderson*, 3 Car. & P. 596. The difficulty in maintaining the suit against the others is, that the law considers, that the one, who has paid for the injury occasioned by him, and has been discharged, committed the whole trespass and occasioned the whole injury, and that he has therefore satisfied the plaintiff for the whole injury, which he received: Co. Lit. 232; Com. Dig., Pleader, 3, M. 12; *Ledsham v. Rowe et al.*, Hob. 66 a; *Kiffin v. Willis*, 4 Mod. 379. The plaintiff by his own act appears to have precluded himself from a recovery against the defendants.

Exceptions sustained, and a new trial granted.

RELEASE OF ONE OF SEVERAL JOINT TRESPASSERS DISCHARGES ALL: *Ellis v. Bitzer*, 15 Am. Dec. 534; *Ellis v. Esso*, 50 Wis. 149, citing the principal case.

COOPER v. PAGE.

[24 MAINE, 73.]

WHERE ONE GUARANTEES ABSOLUTELY TO PAY THE NOTE OF ANOTHER at a specified time, which time is after it becomes payable by the maker, no demand of the maker or notice to the guarantor is necessary, in order to make the latter liable on his guaranty.

WHERE ONE, IN CONSIDERATION OF A CERTAIN SUM OF MONEY, GUARANTEES the payment of a note for a larger amount, and the guaranty is broken, the damages recoverable, in an action against him on his guaranty, are the amount due on the note guaranteed.

ACTION on a guaranty of a promissory note. The facts are stated in the opinion.

Wells, for the defendant.

F. Allen, for the plaintiff.

By Court, TENNEY, J. On November 1, 1841, one Lemont gave to the plaintiff and his partner, who has since deceased, a promissory note of hand on demand and interest, for a balance of accounts arising from the freight of a vessel, of which the payees were part owners, and the maker was master. The settlement was based partly upon a bill of lading of certain merchandise signed by the master, but which he thought embraced some articles that were not in fact received, or were taken out by the mate, before the vessel sailed. On May 2, 1843, Lemont paid one hundred dollars upon the note, and the defendant, for the consideration of fourteen dollars and sixty-four cents, signed the following memorandum on the back of the note: "I hereby guarantee the payment of balance due on note to J. N. and A. Cooper, dated November 1, 1841, signed C. D. Lamont, within sixty days from the second day of May, 1843, balance due this day, two hundred and ninety-two dollars and twenty-two cents." There was no evidence in the case, that Lemont was insolvent or unable to pay the note. The jury were instructed that if the guaranty was not obtained by fraud, but fairly and without deception, the plaintiff would be entitled to recover the full amount of the balance due upon the note, to which instructions the defendant filed exceptions.

It is insisted for the defendant, that to entitle the plaintiff to recover of him, it was necessary, that he should have attempted to collect the debt of the maker by suit; or that he should at least make demand of payment of the maker, and on his refusal to pay, give notice thereof to the defendant. It has repeatedly been held in this state and Massachusetts, that when the promise of the guarantor is absolute, that the note shall be paid at the time stipulated, which time is after it becomes payable by the maker, no demand or notice is required: *Cobb v. Little*, 2 Greenl. 261 [11 Am. Dec. 72]; *Norton v. Eastman*, 4 Id. 521; *Read v. Cutts*, 7 Id. 186 [22 Am. Dec. 184], and cases cited; *Tenney v. Prince*, 4 Pick. 385 [16 Am. Dec. 374]. The case of *Oxford Bank v. Haynes*, 8 Id. 423 [19 Am. Dec. 334], cited for the defendant, was where Haynes signed the memorandum, "I guarantee the within note," before it was discounted at the bank. It was payable in sixty days, and was suffered to re-

main for a balance, for a long time after its maturity, between which and the commencement of the action against Haynes, the makers had become insolvent; the court held that Haynes was not liable, "because both promisors of the note were solvent, when it became due, and that they had abundant property liable to attachment. But the plaintiffs, with a knowledge of their delinquency, lay by nine months, during which time their property was sacrificed and all hopes of obtaining payment were by that means lost."

The objection, that the note was without consideration, can not avail. It was given for that which was due by reason of the maker's written acknowledgment in the bill of lading. With a knowledge of all the facts, he gave the note, which he afterwards recognized as a valid contract by a payment thereon. There is nothing in the contract of guaranty, which shows it usurious. If the ground had been taken at the trial, that it was a device of the parties, got up to avoid the statute of usury, the question might have been submitted to the jury upon proper evidence; that was not done, and the defendant is concluded upon that point. Again it is contended, that the plaintiff can recover only the sum paid to the defendant and interest thereon. The contract was upon a consideration which was legal; the understanding of the parties can not be doubted, and must be carried into effect. The cases relied upon for the defendant in support of his proposition, were actions of indorsees against indorsers of negotiable securities, which were good and available in the hands of the latter, at a greater discount than legal interest, and the damages were confined to the amount paid and interest thereon. The damages in this case, as in those ordinarily brought for non-performance of a contract, must be the sum promised and the interest from the time it was payable. Whether the plaintiff will be entitled to the note on paying the amount, is a question not raised at the trial, and we do not perceive that its decision is at all connected with the points presented.

Exceptions overruled.

CITED in *Vinal v. Richardson*, 13 Allen, 521, to the point that notice of non-payment need not be given to a guarantor to render him liable on his guaranty.

NOTICE TO GUARANTOR, WHEN UNNECESSARY: See *Skofield v. Haley*, 38 Am. Dec. 307, note 308, where other cases are collected.

McCOBB v. RICHARDSON.

[24 MAINE, 82.]

EQUITY WILL NOT RELIEVE, ON GROUND OF MISTAKE, PURCHASER OF LAND, where equal information touching the nature and condition thereof was possessed by both parties, and the vendor acted with entire good faith, although the land turns out to be much less valuable than the parties, both of whom relied upon information derived from the same person, believed it to be.

BILL in equity. The facts appear from the opinion.

N. Weston, for the plaintiff.

Wells, for the defendants.

By Court, WHITMAN, C. J. We have here another instance of the singular infatuation, with which many individuals were seized in the years 1835 and 1836. The plaintiff, then a young man, and but then recently introduced into business in the profession of the law, was induced to embark in the purchase of timber lands; and to invest between five and six thousand dollars, constituting the greater portion of his patrimony, in lands of that description; lying remote from his place of residence, in the wilderness part of this state, to which he had never had access, and of which he had no knowledge; relying for their quality upon the certificates of two individuals, of whom he had only heard a favorable report. In so purchasing, however, he was not singular. Many other individuals did the like. His grantor, a man of mature years, had purchased the same land, under circumstances precisely similar, as to the state of his knowledge, and for the identical price at which he sold to the plaintiff. It turns out, nevertheless, that the intrinsic value of the land was not, probably, over one tenth part of the amount paid for it.

The plaintiff in his bill alleges that the defendant's testator induced him to purchase those lands by the means of misrepresentation; or that the purchase and sale were made under mutual mistake. Of willful misrepresentation, or indeed of any representation, as of his own knowledge, or even of belief, on the part of the testator, the evidence does not furnish the slightest pretense. He had purchased, confiding in the same sources of information, as to value, to which he referred the plaintiff; and to which they each had equal access. The testator pretended to no other knowledge on the subject than was there exhibited, viz., two certificates, then in the possession of a third person, of two individuals, who were equally unknown to the parties con-

tracting. That the latter were under mutual misapprehension as to the intrinsic value of the premises, there can be no doubt. The only question is, was this a case of such mutual mistake as will authorize the maintenance of this bill.

On this branch of the law, it may be conceded, that there is not entire perspicuity. What shall be deemed such a mutual mistake, as will authorize the rescinding of a contract, it is not easy, in every case, to determine. Where the parties to a contract of sale are under a mutual misconception, as to a distinct, essential, and certain particular of it, as for instance, the existence of a dwelling-house, contracted to be sold, with the lot on which it had been known to stand, but which, by a flood or otherwise, had been destroyed, and that without the knowledge, at the time, of either of the parties, the house would be the thing certain, understood by both parties to be essentially the moving cause to the contract, and the principal thing intended to be conveyed; and it turning out, that the vendor had not the thing in being, which he supposed he was about to convey, it would indeed be unreasonable to hold the other party to the bargain.

It is urged here, that the timber was the thing contracted for; and that the land was but the incident, the place of deposit merely, the land without the timber being of very little, if of any, value; that both parties at the time supposed it to be covered with a valuable growth of timber, when in fact the timber thereon was from ten to twenty times less than was supposed. But there is much of fallacy in the position of the plaintiff. There was no fixed and certain item of timber, distinctly and identically in the mind of each party, as intended to be conveyed, as in the case of the dwelling-house before instanced. Neither party could have pretended to have any certain knowledge of what was growing upon the land. Neither had ever seen it. The land itself was a specific thing, distinctly in the mind of each party; but of what was growing upon it no precise idea could be entertained. The value of the growth upon a piece of land is always a matter of uncertainty. Estimates concerning it, even by those who have had the best means of forming an opinion, are more or less merely conjectural; and are often void of the truth; and it is familiar knowledge, that nothing is more difficult than to ascertain with precision, the quantity and quality of a forest growth, on a large tract of land, in a wilderness country. This the parties must be presumed to have well understood. Neither can be supposed, in such case, to have con-

tracted with the other in the belief, that either had any certain knowledge on the subject. Bargains of this description are necessarily made haphazard. Each party speculates, grounding his calculations upon such general information as may be at hand, placing reliance upon his own perspicacity.

This contract was entered into in days notorious for speculation, when but few if any persons, made purchases of timber lands for private use, the object being to sell again at a profit, until which, some operations, by way of getting off timber, might take place. Mistakes of the kind here complained of were without number; all understanding, from the beginning, that no inconsiderable share of hazard was to be encountered. In the absence of fraudulent or erroneous representations, or fraudulent practices on the part of the vendor, it could never have been contemplated, however gross might be the mistake on the part of the vendee, that, in case of loss, he had any ground of complaint; and if fortunate enough to buy ever so advantageously, however great the mistake of the vendor might have been, no one could have supposed, that any portion of his gains was to be refunded.

The case of the plated candlesticks, cited on the part of the plaintiff, supposed to be sold by mistake for solid silver, is surely unlike the case here. Silver candlesticks and plated candlesticks are different articles. Besides, the parties both intended, the one to sell and the other to buy, silver candlesticks. The delivery of plated candlesticks would be a sheer mistake, contrary to the clear intent of both parties. Here the land was sold. This was a thing certain in the view of both parties. If other land had been conveyed, instead of it, it would have been a mistake, which should have been rectified. What there was upon it was a different matter. No one could have had any definite or precise idea concerning it; especially under the circumstances of this case. The similitude between this case, and that of candlesticks sold as and for plated, neither party knowing anything of the thickness of the plate, would be somewhat nearer, if a certificate of a third person, supposed to be a competent judge, were resorted to for the purpose of enabling the parties to fix a price upon them, and it should be proved, by using them, that the estimation was erroneous; and the similitude would be still increased, if it had appeared, that the seller had purchased by the same estimation. In such case it is believed, that the buyer would have no right to rescind the contract, or to recover in equity for the difference in value. So if

a horse were sold and purchased, without warranty of soundness, upon an erroneous estimation of its value by a third person, the vendor knowing nothing of any defects in the horse, if, upon a trial, it proved in a great measure worthless, the buyer would have no ground of complaint against the seller. The buyer must calculate to be subject to such risks, whenever there is perfect innocence on the part of the seller.

The case put by the counsel for the plaintiff of a bale of goods, accompanied with an invoice, bears no similitude to the one here. The invoice imports verity as to the quantity and quality. The vendor so intends it, and knows that the vendee so understands the contract, and the vendor would be guilty of fraud, if it were not so, as he must be supposed to know the contents precisely. In the case here, nothing of the kind was in contemplation of the parties. But we may suppose a package of goods to have become damaged; to what extent could not be known till they were put to use; and a sale effected of the same upon the estimation of one or more persons, of the extent of the injury, which should ultimately prove erroneous, either falling short or exceeding the estimate. This would much more nearly resemble the case here; and yet the sale would be held valid. In Story's Eq., sec. 150, it is laid down, that "where the fact is equally unknown to both parties; or where each has equal and adequate means of information; or where the fact is doubtful from its own nature; in every such case, if the parties have acted with entire good faith, a court of equity will not interpose;" and again in section 151, it is said that "where each party is equally innocent, and there is no concealment of facts, which the other party has a right to know, and no surprise or imposition, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference. It is strictly *damnum absque injuria*."

In *Daniel v. Mitchell et al.*, 1 Story, 172, cited for the plaintiff, the decree was, that "the contract of sale, and the conveyance of the premises, and the notes of the said Daniel thereupon, as set forth in the bill, were made by and between the said Otis Daniel, and the said James Todd, and other parties, upon material misrepresentations, and mutual mistakes, as to the quantity of timber so sold, and therefore ought to be set aside, and held null and void." The judge, in his reasoning, says: "Here then we have a tract, represented by the vendors in their contract, as containing sixty millions of timber, and that supposed fact constituting the very basis of the bargain, when in fact it does not

contain more than one twelfth part of that quantity." There was no doubt expressed, but that the representations were made in the full belief of their accuracy. But such representations, so grossly erroneous, however innocently made, were calculated to mislead; and the party purchasing, as in that case, having no other means of possessing himself of actual knowledge of how the fact was, must be expected to rely upon the representations so made; and, if wronged thereby, should find redress. But where the buyer is not led astray by any such misrepresentations, and acts without being influenced by any statements of the vendor; and in a case where there is unavoidably much of uncertainty; and in a speculation which, for aught that could be predicted, might turn out very advantageously, or very much otherwise, we can not deem any error, into which the buyer might fall, in his calculation upon his profits, to be an adequate ground for rescinding his engagement, either in whole or in part.

The case of *Read's Administrators v. Cramer et al.*, also cited on the part of the plaintiff from 1 Green's Ch. 277, was one of a gross mistake on the part of the vendor of real estate, by including in his description of the land intended to be sold, of which he was not aware, owing to his ignorance of its boundaries, a piece other and much larger than the one intended to be conveyed, and which the vendee, at the time, well knew the vendor did not know to be so included, clearly intending a fraud upon him; a case every way distinguishable from the one here.

The lapse of time intervening in this case, between the sale and the institution of the suit, might well induce a court of equity to pause before granting relief, even in a case presenting some strong indications of a want of good faith, on the part of the defendant. The testator, it would seem, lived some three or four years after the sale; and his executors had administered, and in a manner settled his estate, in the course of three or more years after his decease, without being notified of this claim. If the *gravamen* of the plaintiff's case was so enormous, as in his bill is set forth, such apathy would seem to be inexplicable. People do not often, if at all, so long slumber over such grievous injuries, without seeking for redress. And after a long period has occurred since a cause of action has accrued, and after events have rendered it highly perplexing, that the subject should be agitated, it has not been uncommon for a court of equity to decline to interfere.

On the whole, however much we may regret the misfortune

of the plaintiff, we are brought to the conclusion, that his bill must be dismissed, with costs for the defendants.

MERE MISTAKE OF LAW, WHEN NOT GROUND FOR RELIEF IN EQUITY: See *Champlin v. Laytin*, 31 Am. Dec. 382.

WHEN EQUITY WILL RELIEVE AGAINST MISTAKE: See *Ashcom v. Smith*, 21 Am. Dec. 437; *Gillespie v. Moor*, 7 Id. 559, note 567; *Coger v. McGee*, 5 Id. 610.

OAKES v. MOORE ET AL.

[24 MAINE, 214.]

LIEN, AT COMMON LAW, ORIGINALLY SIGNIFIED THE RIGHT OF ARTISANS and others who have bestowed labor upon or done some act in reference to a thing, to retain it until they are reimbursed for their expenditures and labor bestowed thereon.

NO LIEN IS ACQUIRED, WITHOUT A SPECIAL CONTRACT THEREFOR, in a case where one agrees to cut timber on the land of another and deliver it at a certain place, there to be cut into boards, the price to be paid at stated times after such delivery, and at a certain amount per thousand feet of boards.

NO LIEN IS EFFECTUAL UNLESS IT IS ACCOMPANIED BY POSSESSION, and the moment possession is voluntarily surrendered the lien is gone.

CONTRACT WITH PROPRIETOR OF LAND TO CUT TIMBER THEREFROM and deliver it at a certain place, at an agreed price to be paid after the work is completed, is rather in the nature of a mortgage than of a lien, and the claim of the contractor upon the timber will not be lost by his allowing it to go into the possession of the proprietor of the land, subject to his right to resume it in case payment is not made according to the contract. And where the contractor permits such possession to be taken, with an expectation raised by the proprietor, that the avails of the sale of it will be applied to the payment of his claim, if the proprietor disappoints this expectation he will not be permitted to say that the contractor's right to reclaim the possession has been relinquished by him.

PARTIES AGREEING TO HAVE TIMBER ESTIMATED BY CERTAIN SURVEYOR are bound by his estimate, where it does not appear that he acted corruptly or made any gross mistake.

TROVER for a quantity of pine logs. The judge, among other things, charged the jury that the survey made by Pond was conclusive, unless they were satisfied that he was guilty of fraud in the survey, or unless he acted under a misapprehension of a material fact. The jury found for the plaintiff. The other facts appear from the opinion.

Kent and A. G. Jewett, for the defendants.

J. Appleton and G. F. Shepley, for the plaintiff.

By Court, **WHITMAN, C. J.** Exceptions are taken to the judge's instructions to the jury, in general terms, without pointing out

any part in particular, which is deemed erroneous. This mode of taking exceptions may be very convenient, so far as the counsel are concerned, as it leaves them to find out, at their leisure, in what particular, if any, the instructions are erroneous. To the court, nevertheless, it may be somewhat inconvenient, as it will not be apprised of any casual mistake or omission, into which it may, in the hurry of a trial, have been momentarily led in season to correct or supply it. It may be doubtful whether the court should in such case consider a party aggrieved, so as to be entitled to have exceptions so taken allowed. At common law it would be necessary that the particular ground of exception should be designated, and in season to put the court upon consideration of the supposed error, so that it might be corrected in time to prevent an improper effect from it. Possibly the statute, providing for the taking of summary exceptions, may admit of the mode adopted in this case; and we proceed to the consideration of the judge's instructions as reported. In doing this we do not propose to notice minutely the particular grounds of exception upon which the counsel, in their arguments, have insisted. It will suffice that we take a general view of the case, such as shall substantially amount to a reply to the questions raised.

The plaintiff claims to have had, what he terms, a lien upon the logs, to recover the value of which, this action was instituted. The word lien, in common parlance, is somewhat indiscriminately used, as if it embraced every species of special property, which one may have in goods, the general ownership of which is in another. It originally, and more appropriately, was used to signify the right of detention, which artisans and others, who had bestowed labor upon an article, or done some act in reference to it, had, in some instances, of a right of detention thereof till reimbursed for their expenditures and labor bestowed thereon. Such may be termed a lien at common law. The lien, if it may be termed such, upon which the plaintiff must rely, is not one of this description. In cutting and removing timber from the land of another, at an agreed price, and for the purpose of being sawed into boards, no lien, without a special contract therefor, can be acquired. In the cases of liens of the above description, as at common law, in order to the continuance of the lien, it was and is indispensable, that it should be accompanied by possession. The moment that possession was voluntarily surrendered, the lien was gone. And the authorities cited by the counsel for the defendant are conclusive upon this point; but may be wide of touching the case at bar.

It seems to be admitted, in the arguments of the counsel, that the plaintiff had a lien. If he had, it is important to see how it arose, and what the particular nature of it may have been. We have seen that it could not have been a lien at common law; and neither party contends that it was. If it existed, then it arose upon a special contract; a contract, which was entered into by the plaintiff with one Jefferds, acting as agent for the proprietors of the land, from which the timber in question was taken, and therein we find a stipulation to such an effect was contained. Although Jefferds now says, that he was not authorized to pledge the timber as security for the pay for cutting and removing it, the evidence does not show that the owners ever gave the plaintiff any seasonable notice of their dissatisfaction with this particular stipulation in the contract; nor did they in their instructions to Moore, in April, 1836, notice any such objection. They may, therefore, well be considered as having ratified it. This stipulation will be found to have created, what may be more properly termed, a mortgage, than a mere lien; for it is manifest, that actual possession by the plaintiff was not to be continued; and that the logs were intended to go into the possession of the general owner, subject to the right of the plaintiff to resume it in case of non-payment for his labor, etc., as had been agreed upon. The stipulation for a term of credit therefor, is clearly indicative of such an understanding between the parties; and it might be inferred from the well-known character of such transactions. The term of credit was given for some purpose; and may well be believed to have been given to enable the general owner to avail himself of funds to meet his liabilities from the sale, or other disposition, of the timber.

The plaintiff then, having parted with his possession of the logs, after having performed his contract in reference to them, might or might not resume it upon the expiration of the terms of credit. If he saw that the owners were conducting themselves in a manner affording a reasonable prospect of his availing himself of payment, as soon as his necessities would require it, he might suffer them to continue their possession. In this case, it would seem, that he witnessed the negotiation between their agent and Paine, and saw that it was an arrangement professedly made, with a view to enable them to make payments to him; and doubtless expected to realize therefrom the whole amount due him. He accordingly seems to have waited till the termination of that contract, and, not finding his expectations realized, demanded and sought to regain possession of the logs. We do not see

but he might well do so. He had not in express terms, relinquished his right to the timber as secured by his contract; and if he looked on, and saw the owners making arrangements to dispose of it, it can not be doubted, but that it was with an expectation raised by them, that he should have the avails of it to the extent of his claim. They, having disappointed him in this expectation, should not be permitted now to say, that he has relinquished his right to regain possession; nor to withhold from him the value of the timber to the extent of his first demand. No demand, as evidence of a conversion, would seem to have been necessary; for an actual conversion seems to have been abundantly proved. The defendant, Moore, has undertaken, in his contract with Paine, to deal with the timber as being the property absolutely either of himself, or of Wilcox and others; and, moreover, the defendants now dispute the right of the plaintiff to any claim upon it. Whether a demand of the timber, therefore, was made upon the agent, or upon the principals, it does not seem important to inquire.

The instructions, in reference to the survey of the timber by Pond, were not erroneous. He had been mutually agreed upon by the parties to perform that service. They should, therefore, be concluded by what he did, as it did not appear that he acted corruptly, or made any gross mistake. The supposed mistake, noticed by one of the counsel for the defendants, in ascertaining the amount due to the plaintiff, does not come before us upon this bill of exceptions, and can not therefore be noticed.

Exceptions overruled.

LIEU, NATURE OF: See *Andrews v. Doe*, 38 Am. Dec. 450; *Grinnell v. Cook*, Id. 663, and note 668, where other cases are cited and collected.

STATE v. GODFREY ET AL.

[24 MAINE, 232.]

INDICTMENT IS INSUFFICIENT, IF FACTS ALLEGED BY IT may all be true, and yet constitute no offense, and a verdict upon such an indictment does nothing more than merely verify the facts charged.

DEFECTIVE INDICTMENT IS NOT AIDED BY VERDICT, and a judgment thereon may be arrested.

WHERE AN OFFENSE IS CREATED BY STATUTE, and there is an exception in the enacting clause, an indictment for such offense must negative the exception; but if there be a proviso therein which furnishes matter of excuse for the defendant, the indictment need not negative it, but he must plead it.

INDICTMENT for a nuisance. The defendants were found guilty, and filed a motion in arrest of judgment, for insufficiency of the indictment. The other facts appear from the opinion.

F. Allen, for the motion.

Bridges, attorney general, for the state.

By Court, TENNEY, J. This indictment is at common law, and alleges that the Penobscot river, between the towns of Orono and Hampden, for more than twenty years next preceding, had been a navigable river, and an ancient and common highway for the passage and navigation of boats, rafts, and craft, at the pleasure of all the good citizens of this state, and charges the defendants with having erected thereon a dam of certain dimensions across said river, to the damage and injury of the citizens of the state, in exposing to destruction their boats, rafts, and craft, in their passage upon said river, and to their common nuisance, etc. A verdict of guilty having been rendered by the jury, the defendants have filed a motion in arrest of judgment on the ground, that no offense is charged in the indictment.

It is a well-established principle, that if all the facts alleged in an indictment may be true, and yet constitute no offense, the indictment is insufficient. A verdict does nothing more than to verify the facts charged, and if these do not show the party guilty, he can not be considered as having violated the law: *Rex v. Lyme Regis*, Doug. 153; *Commonwealth v. Odlin*, 23 Pick. 275. In *Rex v. Horne*, Cowp. 672, Lord Chief Justice De Grey lays down the rule thus: "The charge must contain such a description of the crime, that the defendant may know what crime it is, which he is called upon to answer; that the jury may appear to be warranted in their conclusions of guilty or not guilty upon the premises delivered to them, and that the court may see such a definite crime, that they may apply the punishment, which the law prescribes." A defective indictment is not aided by verdict, and a judgment may be arrested thereon: 4 Bl. Com. 375.

By an act of the legislature of this state, passed February 12, 1828, which is declared therein to be a public act, certain persons named, and their associates and successors, were "empowered to erect and keep a dam or dams across the Penobscot river from Bangor to Brewer or Eddington, with such canals, locks, sluices, wharves, piers, and side-booms at such place or places as they may deem most safe and convenient, between the

foot of Rose's or Treat's falls in Bangor, and McMahon's falls in Eddington, for the purpose of flowing the water a sufficient height for the safe and convenient passage of rafts and boats from the foot of Eager's falls, in Orono, to Bangor. And said corporation may erect mills and factories, and use the water flowed by said dam or dams; and may hold and possess real and personal estate not exceeding the value of two hundred thousand dollars, and the same or any part thereof, may sell and convey in fee simple, or any less estate. Provided, that by the erection and maintenance of any dam or other works by said corporation, the navigation and free passage of vessels, boats, rafts, lumber, and fish in and upon said Penobscot river, shall not be impaired, lessened, or impeded more than the same shall be improved and benefited by the acts of said corporation."

The indictment refers to no exception, consequently does not negative the erection as being within the charter granted; there is no allegation, that the dam was placed beyond the limits prescribed, or that any of the provisions mentioned in the proviso were not followed. The charge is for making those erections, that are fully authorized by the statute, which courts are bound officially to notice as a part of the public law of the land. The question then is presented, whether the indictment should allege, that the dam was not erected in pursuance of the authority of the statute, or whether the privilege conferred thereby should be pleaded by the defendants.

When an offense is created by statute and there is an exception in the enacting clause, the indictment must negative the exception. But if there be a proviso, which furnishes matter of excuse for the defendant, it need not be negated in the indictment, but he must plead it: *Speirs v. Parker*, 1 T. R. 144, 145; *King v. Pratten*, 6 Id. 559; *Rex v. Jarvis*, 1 East, 644, 645, note h; *Bennet v. Hurd*, 3 Johns. 438; *Teel v. Fonda*, 4 Id. 304; *Commonwealth v. Odlin*, 23 Pick. 275. In this case the indictment is not for a violation of any statute, but for a nuisance upon a river, which had by prescription become a public highway. The statute modified the common law, and so long as it should be in force suspended the privileges previously enjoyed, which were inconsistent therewith. The common law no longer existed, so far as this modification extended. If the erection as described in the indictment, was only such, as was authorized by the statute, there was no law which was infringed. The case of *The King v. The Mayor etc. of Liverpool*, 3 East, 86, is in point. It was an indictment for non-repair of a highway within a certain

limit, charging the corporation of Liverpool with a prescriptive liability to repair all common highways, etc., within such limits, excepting such as ought to be repaired according to the form of the several statutes in such cases made, without alleging that the highway in question was not within any of the exceptions. Lord Ellenborough, C. J., asks, "what answer can be given to the objection, that as the prosecutor has pleaded a prescription to repair within the exception of these statutes, he ought to have averred that the street in question was not within any of the exceptions?" and Lawrence, J., said, "suppose a statute had passed to say that the corporation were not bound to repair new streets, made after the first of January, 1801, must there not have been an averment, that the street was made before that time?" and judgment was arrested. The indictment is not in conformity to established rules of criminal pleading, and

Judgment is arrested.

RULE THAT INDICTMENT MUST NEGATIVE EXCEPTIONS IN STATUTE does not apply to a case where the charge preferred *ex natura rei* conclusively imports a negative of the exceptions: *State v. Price*, 37 Am. Dec. 81.

INDICTMENT, CHARGING STATUTORY OFFENSE, FORM OF: See note to *State v. Price*, 37 Am. Dec. 84, where other cases in this series are collected.

AGRICULTURAL BANK v. ROBINSON ET AL.

[24 MARE, 274.]

BANK CAN NOT MAINTAIN SUIT ON NOTE GIVEN TO IT without consideration, for the purpose of making a colorable and false statement of the condition of its assets.

ASSUMPSIT. The opinion states the case.

Hobbs, for the defendants.

Kent and S. W. Robinson, for the plaintiffs.

By Court, SHEPLEY, J. This suit is upon a promissory note for the sum of ten thousand nine hundred and sixty-one dollars and twenty-five cents, made by the defendants on April 1, 1838, payable to the bank, or order, in six months after date. The case is submitted, as an agreed statement, upon the deposition of the former cashier of the bank. He states, in substance, that five persons named, and one firm composed of two other persons named, owned stock in the bank to the amount of two thousand dollars each; that their several notes for two thousand dollars each, given for that stock, remained in the bank from

the commencement of its operations until their stock was transferred, when they were delivered up to them respectively, by order of the directors; that they transferred this stock, to the amount of two thousand dollars, to Stillman Wilson, and the remainder, amounting to ten thousand dollars, to the bank; that this note was made to the bank on the occasion of such transfer of stock to the bank; and that the only consideration for it was such transfer of stock to the bank.

There was no agreement, that the bank should hold it in trust or for the benefit of the defendants. On the contrary there was, as the witness states, a verbal agreement made at the time, that they should not be called upon to pay the note. By such a transfer and arrangement, the defendants neither obtained nor could obtain any legal or beneficial interest in that stock. The stock was not transferred to the bank at their solicitation. That arrangement, according to the testimony, was wholly made between the former owners of the stock and the bank. The corporation parted with nothing to obtain the note; nor did it incur any liability or suffer any injury on account of receiving it. The only purpose disclosed for making the note, appears to have been to enable the corporation, by including it as a part of its funds, to make a colorable and false statement of its actual condition. This might have been a just cause for a revocation of its charter; and the persons concerned in such an arrangement to deceive, might perhaps have been indicted and punished for a conspiracy, with intent to deceive and defraud the creditors or stockholders of the bank. But such illegal proceedings and liabilities could not change the fact, that there was neither benefit to the one party nor loss to the other, to form a consideration for the promise. If a man of property were to make a note without any consideration therefor, to a person of doubtful credit, to enable him to use it by an exhibition of it to obtain credit, and he should thus use it, and obtain the desired credit; is the law such, that the promisee, upon such proof, could recover the note of the promisor? When the law shall conclude, that an agreement between two persons to deceive and defraud a third constitutes a valuable consideration for the contract between themselves, he may; but not till then. The bank, in this case does not appear to be able to place itself in a more favorable condition for a recovery. Nor can any injury, which a creditor or stockholder of the bank may be supposed to have suffered by it, constitute a consideration for the note. There is, in the first place, no proof, that any particular creditor or stockholder has

in fact suffered by the making of the note. And the court can not properly enter upon a wide range of conjecture, and infer, that some one must have suffered by it, because the assets of the bank, as an insolvent corporation, were nearly four years afterward, placed in the hands of receivers.

Moreover, if the doctrine were admitted, that the probability of loss or injury, which the creditors or stockholders of a corporation might sustain by its taking a note and making a false exhibit of its funds, constituted a sufficient consideration for it, it would be difficult for any one to avoid his contract with a corporation by proof of a want, or a failure of consideration. It would not be difficult, in many cases, for the corporation to prove, that such contract had been exhibited as constituting a part of its assets, and that debts had been contracted with those, who relied upon such assets as the means of payment; or that its stock had been sold, and dividends declared upon it, on the faith, that such contract constituted a part of its funds. But a more conclusive answer is, that there must be a consideration at the time of making the contract. And that no injurious consequences to the parties or to others, which may afterward happen from their having made it, can constitute a legal consideration for it.

A nonsuit is to be entered.

WHITMAN, C. J., dissented.

HUNT v. HASKELL.

[24 MASS., 339.]

COMMON CARRIER OF GOODS IS ENTITLED TO PRO RATA FREIGHT, where the owner of them is willing to receive them at a place short of that to which the carrier stipulated to carry them.

CARRIER OF GOODS CAN NOT OF HIS OWN MERE MOTION lawfully sell them for the payment of his charges. But if he sells them, and the owner regains possession through a friend who buys them in, the owner, in an action of trover therefor, can recover only whatever damages he sustained in regaining the possession.

TROVER. The opinion states the case.

Rowe, for the plaintiff.

Hobbs, for the defendant.

By Court, WHITMAN, C. J. The defense, as exhibited, can not be sustained. The defendant was a packet master; and, as such, undertook to bring, for the plaintiff, certain boxes of

merchandise, of which those named in the declaration were a part, in his packet, from Boston to Bangor; and in January, 1842, arrived with them at Frankfort, which, owing to the ice in Penobscot river, was as near as he could convey them, in his vessel, to the port of destination; and there landed them, and demanded his freight, and advances, which he had made on account of them in Boston. The plaintiff, thinking he demanded too much, tendered what he admitted to be due; and demanded his goods. The defendant refused to receive the amount so tendered, and caused the quantity sued for to be sold at auction for the amount claimed by him, and the expenses of sale. The plaintiff thereupon instituted this action of trover to recover the value thereof.

It is very clear that the defendant had no right to cause the sale to be made of his own mere motion, and without the intervention of legal process for the purpose. The law merchant recognizes no such right on the part of carriers by sea, under a common bill of lading, such as the defendant had signed in this instance. If the plaintiff was willing to receive his goods at Frankfort, which by his tender and demand of them there, it seems he was, the defendant might well insist on a *pro rata* freight, and on detaining the goods until it was paid; but a simple detention only, in the first instance, was all that could be insisted on. It is urged, that the defendant was without a convenient remedy, unless the course he pursued can be sanctioned; that the courts of this state, having no jurisdiction in equity in such cases, the only resort, if the defendant could not sell as he did in this case, must be to the United States court of admiralty, which would be extremely inconvenient; and, therefore, that it is highly proper to uphold the proceeding adopted by the defendant. But it is not for courts to alter an established law. It is the duty of courts, as has often been remarked, to expound and apply the law, as it may be found established, and not to legislate.

But it appears that the plaintiff attended the auction, and, through the intervention of a friend, regained possession of his goods, by paying the auction price, and five dollars more to his friend; and it is not shown that, when so received, they were not in good order. This must be allowed to go in diminution of the damages, which the plaintiff would otherwise be entitled to recover. Whatever damages he sustained, over and above what was fairly due to the defendant, in regaining possession of his goods, he is entitled to have allowed him. The five dol-

lars paid to his friend for bidding off the goods; five dollars and thirty-one cents for auctioneer's fees; five dollars for his own time in endeavoring to regain possession of his goods, and six dollars, being the difference between the freight demanded, and the amount tendered, with interest on these sums, making twenty-two dollars and fifty cents, the plaintiff must have judgment for: *Murray v. Burling*, 10 Johns. 172; *Greenfield Bank v. Leavitt*, 17 Pick. 1 [28 Am. Dec. 268]. He can not have judgment for the value of the goods; for he was never divested of his property in them. Neither the acts of the defendant, nor the sale at auction, nor being in market overt, there being none such in this country, as there is in England, could effect a change in the right of property. The plaintiff, if his tender was sufficient, might have maintained an action of replevin for his goods, against the defendant, or against a purchaser at the auction sale, as well as trover against the defendant; and the latter action is maintainable only upon the ground, that the defendant had done, in reference to the goods, what was unauthorized by law.

Defendant defaulted for twenty-two dollars and fifty cents.

PRO RATA FREIGHTAGE, WHEN CARRIER MAY RECOVER: See *Parsons v. Hardy*, 28 Am. Dec. 521, note 523; *Harris v. Rand*, 17 Id. 421, note 423.

LARRABEE v. FAIRBANKS.

[24 MAINE, 363.]

WHERE ONE HAS BEEN INDUCED BY FALSE REPRESENTATIONS TO INDORSE A NOTE, parol evidence is admissible to prove that fact.

WANT OF CONSIDERATION FOR INDORSEMENT MAY BE SHOWN between the immediate parties to the contract.

ASSUMPSIT. The opinion states the case.

Cutting, for the plaintiff.

McCrillis, for the defendant.

By Court, WHITMAN, C. J. The defendant is sued as indorser of a note; and it is admitted, that he indorsed it; and that there has been due notice to him of its dishonor. The defense is, that he was inveigled into the indorsement of it without consideration, and by false pretenses. The note was payable to Thomas O. Parkman, or bearer, and by him indorsed. The indorsement of it by the defendant was not, therefore, necessary to its transfer to the plaintiff; and the plaintiff had purchased it

of the defendant without his indorsement. But afterwards finding there was likely to be some difficulty in recovering it, he applied to the defendant for his indorsement. To this the defendant at first objected. The plaintiff then states to him, that he was about getting the note discounted, and that it was necessary it should be indorsed by him; that it was a matter of form; that it was the custom of the bank to have the indorsement upon it, of every person through whose hands it had passed; and that by putting his name on it he would not be rendered liable therefor. Upon which the defendant indorsed it. There was other evidence tending to show bad faith on the part of the plaintiff towards the defendant in obtaining his indorsement. To this defense the plaintiff objected, alleging, that it was not competent to the defendant to avail himself of it, as it tended to vary the legal liability of the defendant, created by his indorsement. The cause was submitted in the court below upon an agreed statement of facts, and a nonsuit was there entered, from which an appeal was taken to this court.

It is very clear, that this defense does not come within the principle, that a contract in writing shall not be varied by parol testimony. It may be, that, if the defendant had, at the time of negotiating or selling the note to the plaintiff, a verbal agreement, that in case of the failure of the maker to make payment, he should not be responsible as indorser, it would be incompetent for him to make such proof in his defense. But here the plaintiff had accepted of the note, which was transferable by delivery, without the defendant's indorsement. The contract between them was then finished and ended. The indorsement subsequently obtained, was, therefore, without consideration; and this may always be shown, between the immediate parties to a simple contract. The defense, therefore, was good upon this ground.

And surely any party to a contract, even although it may be a specialty, may give in evidence, to avoid liability under it, deceit and circumvention in obtaining it. In this case, it is abundantly manifest that the defendant was led to place his name upon this note as indorser, when he was not bound to have done so, by false pretenses on the part of the plaintiff. Upon this ground also the defense was complete.

Plaintiff nonsuit.

PAROL EVIDENCE TO AFFECT INDORSEMENT: See *Perkins v. Catlin*, 29 Am. Dec. 282, note 299; *Barrows v. Lane*, 26 Id. 293; *Johnson v. Martinus*, 17 Id. 464; *Miner v. Robinson*, 12 Id. 694, note 696; *Hill v. Ely*, 9 Id. 376, note 381.

LORD v. JONES.

[24 MAINE, 439.]

NO ONE CAN LAWFULLY ASSUME THE CHARACTER OF INNKEEPER in Maine, unless he has first obtained a license therefor according to the provisions of the statute; and it makes no difference that he lives in a part of the state where there are no such officers as the law requires to give a license.

PERSON WITH WHOM LAME HORSE IS LEFT TO BE KEPT AND CURED has a lien, in the character of a farrier, upon the horse for his cure and keeping. And such person can not be considered as having waived his lien by agreeing to buy the horse from one who had no authority to sell him.

REPLEVIN for a horse. The defendant alleged that he had a legal claim or lien upon the horse for the keeping and care of him, and for medicine for him. The horse was brought to the defendant, who kept a public house at Mattawamkeag Forks, which was an unincorporated place, by a person who represented that the horse belonged to one Jefferds. Jefferds afterwards sold the horse to the defendant for seventy dollars, allowing thirty-five dollars for the cure and keeping, and receiving the balance in money. The defendant kept the horse until he was replevied by the plaintiff. He had never been informed that the horse was the plaintiff's. The judge instructed the jury that, if they believed the testimony, they might consider the defendant as entitled to a lien upon the horse for his keeping and cure. It was agreed that if this instruction was incorrect, the verdict for the defendant should be set aside, and a new trial granted.

T. J. D. Fuller, for the plaintiff.

Hobbs, for the defendant.

By Court, SHEPLEY, J. The instructions in this case authorized the jury to find, that the defendant was entitled to a lien upon the horse for his keep and cure. It is insisted for the plaintiff, that they were erroneous. For the defendant it is contended, that they may be sustained on the ground, that he was an innkeeper; and the facts proved would be sufficient to entitle him to be so considered by the rules of the common law. In this state no person can lawfully assume that character without first obtaining a license therefor according to the provisions of the statute, c. 36. The seventeenth section of that statute provides, that no person shall be a common innholder, except such person be duly authorized therefor. It is said, that the provisions of this statute should be considered as limited to cities, towns, and plantations, in which alone licenses can be obtained. That a

construction, which would include the unincorporated places in our new settlements, would prevent their legal existence there. Such may be the result, and it may be desirable, that the law should be otherwise; but that would not authorize the court to except all those parts of the state, when the language is general, and operative over every part of it, without finding any such exception in the statute. If the defendant could be considered as an innkeeper, it is doubtful, whether he would be entitled in that character to a lien in this case. Neither the owner of the horse nor the person to whom he was intrusted, was entertained at the inn, when the horse was left with him; and the decided cases are at variance, whether a lien exists under such circumstances. The case of *Mason v. Thompson*, 9 Pick. 280 [20 Am. Dec. 471], would be favorable; and the case of *Grinnell v. Cook*, 8 Hill, 485 [38 Am. Dec. 663], opposed to it. The defendant may, however, sustain the lien in the character of a farrier, or person having the horse intrusted to him to be kept and cured. The testimony shows, that the horse was left with him for that purpose, and that he caused him to be kept and cured. Some difference of opinion will be found in the earlier cases, whether he would, under such circumstances, be entitled to a lien: *Tailbois v. Sherman*, 21 Hen. VI., 55; Keil. 50; *Benan v. Currint*, Say. 224; *Ex parte Deese*, 1 Atk. 228; *Ex parte Ockenden*, Id. 236. In more modern times the courts have been favorable to the existence of particular, and less so to general liens. In the case of *Savill v. Barchard*, 4 Esp. 55, Lord Kenyon said, the courts of law, and the understandings of people in general, had gone much in favor of these liens. In *Jacobs v. Latour*, 5 Bing. 130, Best, C. J., observed, that as between debtor and creditor, the doctrine of lien was so equitable, that it could not be favored too much. That spirit is found pervading the latter treatises and decisions. Kent states, that "the law has given this privilege to persons concerned in certain trades and occupations, which are necessary for the accommodation of the people. Upon this ground common carriers, innkeepers, and farriers had a particular lien by the common law." And that "the same right applies to a miller, printer, tailor, wharfinger, or whoever takes property in the way of his trade or occupation to bestow labor or expense upon it:" 2 Kent, 634.

Story also states, that a bailee, for work on a thing, has a lien upon it for the amount of his compensation: Story on Bail., sec. 440. And that salvors, innkeepers, common carriers, farriers, blacksmiths, tailors, shipwrights, and other artisans, have such a

lien: Story on Agency, sec. 355. That a printer had a lien on the printed sheets for compensation for printing them was decided in the case of *Blake v. Nicholson*, 3 Mau. & Sel. 167. That a miller had upon the meal, which he had ground, in the case of *Chase v. Westmore*, 5 Id. 180. And that a stable-keeper had upon a horse sent to him to be kept and trained for the race-course, in *Bevan v. Waters*, 3 Car. & P. 520. The cure of a lameness or disease to which the horse was subject, would seem to be a service quite as meritorious, and as much deserving the favor of the law, as the training him for a race-course. Best, C. J., did not however found his opinion upon the particular merit of that service, but upon the doctrines of the common law. "For I take it (he says) to be a common law principle, that if a man has an article delivered to him, on the improvement of which he has to bestow trouble and expense, he has a right to detain it, until his demand is paid." These authorities would authorize the instructions in this case, unless the testimony shows, that the defendant, by some act of his own, had waived or destroyed his lien. He cannot properly be considered as having waived, or as intending to waive it, by his contract with Jefferds to receive the horse in payment of the amount due to him, paying the difference in value, when he obtained no title by that contract, because Jefferds had no authority to make it. By that want of authority the contract became ineffectual and inoperative for any purpose. And if, as some of the witnesses state, the defendant said, he had sold the horse to his brother, while he supposed his own title to be perfect, that would not show any intention to waive his lien. It might have defeated it, if there had been proof of an actual sale and delivery. That his brother could have obtained no title by any such attempted sale is apparent, for the defendant could not sell that, which he did not own. The defendant, without any fault on his part, having been led into those inoperative proceedings by the deceit of Jefferds, should not be prejudiced by them. His compensation for the keep and cure of the horse still remained unpaid, and the horse still remained in his possession.

Judgment on the verdict.

CITED in *United States v. Deslin*, 6 Blatchf. 74, to the point that the negligence of a revenue officer to enforce the law does not excuse the violation thereof.

INNKEEPER, WHO IS AN: See note to *Clute v. Wiggins*, 7 Am. Dec. 449.

CHICK ET AL. v. PILLSBURY.

[24 MAINE, 458.]

NOTICE OF DISHONOR OF NOTE, WHICH IS MAILED within a convenient time after the commencement of business hours on the day succeeding that of the dishonor, is sufficient to charge the indorser.

ASSUMPTUM. The opinion states the case.

W. G. Crosby, for the plaintiffs.

A. G. Jewett, for the defendant.

By Court, WHITMAN, C. J. This is an action against an indorser of a promissory note, who contends, that he has not been seasonably notified of its having been dishonored by the maker. The note became due in the city of New York, on the twenty-ninth day of November. The mail closed there, daily, at six o'clock in the morning for Bangor, the residence of the defendant. According to the evidence, it seems, that the notice of the dishonor of the note was not put into the post-office at New York until the latter part of the next day, being the thirtieth of November; and therefore not in season to go before the morning of the first of December. The question is, was this reasonable notice. It is not a little singular, that a question of this kind should, to this day, have remained in doubt.

It was said in the books, formerly, that where the parties lived in different towns, between which a regular post was established, the notice of dishonor should be dispatched by the next post. It was next held that it should be sent by the next practicable mail; and, subsequently, as early as by the mail of the next day; and this has been supposed by some, to mean by such mail, however early in the morning it might start. In *Goodman v. Norton*, 17 Me. 381, it was held that the notice of dishonor must be put into the post-office on the day of the demand upon the maker; or in season to be sent by the first mail of the succeeding day. The circumstances in that case were almost, if not quite, identical with those in the case before us. The mail in that case left New York daily at six o'clock in the morning. On the twenty-seventh of November a note fell due, and was dishonored. Notice of the non-payment was not put into the post-office till the next day, and after the morning's mail left. Although there was testimony in that case that notice, so given, was according to the usage of the banks in that city, yet the indorser was held to be discharged. And in *Beckwith v. Smith*, 22 Id. 125 [38 Am. Dec. 290] Mr. Justice Shepley, in delivering the

opinion of the court, recognized the same principle as the rule of law. These decisions we are now called upon to revise; and, although supported by numerous *dicta* to be found in elementary treatises and reports, yet, if erroneous, we can not hesitate to do so; especially in reference to a point of such extensive application.

It must be admitted to be of infinite importance, in this commercial age, that decisions, in reference to what constitutes due notice of the dishonor of bills of exchange, and promissory notes, should be the same throughout communities, which are in the habit of circulating and interchanging such paper; so intimately connected as it is with extended negotiations in trade. All laws affecting commercial pursuits should, as near as may be practicable, partake of the character of international law. Between the United States and Great Britain, a uniformity of usage, in whatever concerns negotiable paper, is highly important. In both countries the principles of the law merchant are derived from one and the same source. In the United States, in an especial manner, it is all-important, that there should be the same rule prescribing what shall be legal notice in the case of dishonored paper. If the decision of this court has failed of conforming to what, in the other states, would meet with sanction in their judicial tribunals, it will be highly proper that we should take the earliest opportunity to consider further of the subject. It is evident that the tendency has been, of late, so to extend the time for giving notice, that some approximation, at least, may be made to the establishment of a rule in such cases, which shall be readily understood, and easily applied; and as nearly applicable to all cases as possible.

In *Whitwell et al. v. Johnson*, 17 Mass. 449 [9 Am. Dec. 165], Mr. Chief Justice Parker says: "After some doubts, and looking into authorities, we are satisfied, that it was not necessary for the plaintiff to show, that notice to the indorser was put into the mail on the same day the note became due." And, again, he says in the same case: "The next day is early enough. And if there should be two mails a day, whether the notice goes by the first or the second of those mails, we think is immaterial, provided it was put into the post-office early enough to go by a mail of that day." Hence, if the notice need not be put into the post-office till the next day, it could not, it would seem, be required to put it in at an unseasonable hour of that day. Six o'clock in the morning of the thirtieth of November would be by break of day, and earlier than it could be expected, of men

of business, in our commercial seaports, to be stirring, and therefore at an unseasonable hour. In the *Bank of Alexandria v. Swann*, 9 Pet. 33, the notice of dishonor was put into the post-office at Alexandria on the day succeeding that of the dishonor. The mail left there some time in the night, and generally between twelve and two o'clock for Washington, to which place the notice was dispatched, in time to be delivered at eight o'clock in the morning. In strictness the mail, which left in the night after the dishonor, was the mail of the next day; but the court held the notice was forwarded in due season.

In *Geill v. Jeremy et al.*, Moo. & M. 61, Lord Tenterden said: "In these cases it is important to have a fixed rule, and not to resort to nice questions of the sufficiency, in each particular case, of a certain number of hours or minutes. The general rule is, that the party need not write on the very day that he receives the notice. If there be no post on the following day, it makes no difference. The next post after the day on which he receives the notice is soon enough." In *Firth v. Thrush*, 8 Barn. & Cress. 387, the attorney of the holder could not, at first, find out the residence of the party to be notified. At length ascertaining it, he took one day to consult his client; and on the third day dispatched notice, and it was held sufficient, upon the ground that he might be regarded in the light of a bank, holding a bill for collection. In which case it had been held, that the bank need not notify the owner till the day after the dishonor; and that the owner was entitled to still another day to dispatch his notification to his indorsers. In *Wright v. Shawcross*, 2 Barn. & Ald. 501, it was held that a person, receiving notice on Sunday, was not bound to open it till Monday, and that notice by the post of the following Tuesday evening instead of that of Monday evening, was sufficient. In *Hawkes v. Saller*, 4 Bing. 715, Mr. Chief Justice Best, in reference to notice of the dishonor of a bill, which took place on Saturday, at a place at which the mail left at half past nine o'clock in the morning of each day, expresses himself to be decidedly of opinion, that notice by the mail of the following Tuesday morning would be seasonable. This must have been upon the ground that Sunday, being no day of business, the next business day was Monday; and that it was not reasonable to require notice to be dispatched by the mail, which left at half past nine o'clock on Monday morning. *A fortiori* if it had closed at six o'clock in the morning, as in the case at bar, it would have been unreasonable to have required notice to have been dispatched by

tt. In *Freeman's Bank v. Perkins*, 18 Me. 292, Mr. Chief Justice Weston says: "On the day of the maturity of the bill he (the holder for collection) caused it to be protested for non-payment, and notices to be forwarded to the drawer, indorser, and acceptor, which were mailed the next day; and this was using all the diligence which the law requires." If it was sufficient that the notices should be mailed the next day, it would seem to follow, that it could not be required to be done at an unreasonable hour of that day, and by break of day in the morning or before. But the case, most directly and explicitly in point to show, that notice need not be put into the post-office till the next day after dishonor, nor then until after the commencement of business hours, is to be found in the first of Hill's New York reports, page 263, *Howard v. Ives*. Mr. Justice Cowen, in delivering the opinion of the court in that case, says: "The holder is never required to mail notice to his indorser the very day on which default is made in payment." "Here the protest being on Saturday the notice was properly mailed on the next Monday." "Mailing in season for either of the two mails on Monday was sufficient." "It is not necessary to say, that, in all cases where there are several mails on the same day, the party may elect by which he will send. Clearly he comes to the mark, when he selects that post which leaves next after the hours of business commence for the day. This is the next practicable or convenient post."

In Kent's Commentaries (vol. 3, p. 106), the author lays down the law to be, "That if the third day of grace be on Thursday, and the drawer and indorser reside out of town, the notice may indeed be sent on Thursday, but must be put into the post-office on Friday, so as to be forwarded as soon as possible thereafter." And again (same page), "It seems to be now settled, that each party, into whose hands a dishonored bill may pass, shall be allowed one entire day for the purpose of giving notice." And it was so held in *Bray et al. v. Hadwen*, 5 Mau. & Sel. 68. In a note in 3 Kent's Com. 107, 4th ed., the author says, "the rule in *Lenox v. Roberts*, 2 Wheat. 373, was laid down too strictly, when it stated that the demand of payment should be made upon the last day of grace, and notice of the default be put into the post-office early enough to be sent by the mail of the succeeding day." And, although this decision was spoken of with approbation in *Bank of Alexandria v. Swann*, 9 Pet. 33; yet "that the decision only is, that notice need not be put into the post-office on the day of the default." And

again (same page), "That this principle will sustain the rule as now generally and best understood in England, and the commercial part of the United States, that notice put into the post-office on the next day, at any time of the day, so as to be ready for the first mail that goes thereafter, is due notice."

In Story on Bills, sec. 288, it is laid down, "That if the post or mail leaves the next day after the dishonor, the notice should be sent by that post or mail, if the time of its closing or departure is not at too early an hour to disable the holders from a reasonable performance of the duty." And again, sec. 290: "He, the holder, is always allowed by law a whole day for this purpose." Under this last section, in a note, he makes a long extract from Chitty on Bills, in which this passage occurs: "Another reason is, that the holder ought not to be required, *omissis omnibus aliis negotiis*, to occupy himself immediately in forwarding notice to the prior parties, when, by delaying that step till the next morning, he would, after the pressure of other business had subsided, have in the evening, or early the next morning, before the general business commences, time to look into his accounts with the other parties." This author is again quoted in the note as saying, in another part of his work, that notice must be sent off by the post of the next day, whether it goes early or late. Upon this passage Judge Story remarks: "It appears to me the rule is not so strict as it is laid down in this last passage of Mr. Chitty, and that it would be more correct to say that the holder is entitled to one whole day to prepare his notice, and that therefore it will be sufficient if he sends it by the next post that goes after twenty-four hours from the time of the dishonor." This shows what this learned author understands by one whole day, so often repeated in the cases upon this point. And it may be difficult to affix any other understanding or meaning to that phraseology. Judge Story, however, admits that in this he is supported by the authority of no adjudged case directly; but thinks it results from the authorities on the subject. That Mr. Chitty's last quoted sentence is liable to exception, is manifest from the preceding quotation from his work; for the latter can not be reconciled with the former, or with the adjudged cases.

The authorities, cited on the part of the counsel for the defendant, are numerous, tending to show that the notice to drawers and indorsers, not resident in the places where the holder of their dishonored paper may live, should be given as early as by the mail of the next day, and some of them, such as the *dictum*

in the last extracts from Chitty, and the cases of *Goodman v. Norton* and *Beckwith v. Smith*, seem to go the length of holding that notice should be given by the mail of the next day, however early it might start. But the question pending in the reported cases, generally, was whether the notice should be sent the same day, or by a mail of the succeeding day, and did not present the question whether it should be sent by the mail of the next day, however early it might start, or by a later mail, or a reasonably practicable mail.

In a late case, *Chouteau v. Webster*, 6 Metc. 1 [39 Am. Dec. 705], it appears a note was protested in New York, at three o'clock, on the afternoon of one day; and that the notice of dishonor was dispatched to the indorser, by being put into the post-office in New York for him on the next day. Mr. Chief Justice Shaw, in delivering the opinion of the court in that case, says, it is admitted, "that notice thereof (of the dishonor) in due form was seasonably prepared by the proper officer, and put into the post-office." Nothing is said in the case as to the hour of the day when the mail was made up to convey the notice to the defendant, nor of the precise time of the day when the notice was put into the post-office. If either had been deemed material, surely it would have been alluded to, either in the statement of the case, or in the arguments of counsel. It could not well have escaped the notice of the counsel for the defendant, aided as he must be believed to have been, by the superior legal knowledge of the latter.

A majority of the court is, therefore, brought to the conclusion, that the weight of the more modern authorities, both in England and America, is decidedly in favor of a rule of a more convenient and reasonable operation. It may not go to the extent of allowing at least twenty-four hours for the purpose of dispatching notice, though it might tend to certainty and precision if such were the case. It seems to be without question, that it extends to the allowance of a convenient time after business hours of the next day after the dishonor shall have commenced, to prepare and dispatch notice. To the decision of this cause it is not necessary to consider whether the rule should extend further or not. The notice was mailed in season to go by the next mail which left after the business hours of the day, succeeding that of the dishonor, had commenced.

The action, therefore, as agreed by the parties, must stand for trial upon other grounds.

SHEPLEY, J., dissented from the opinion of the majority of the court. He argued that it would be unreasonable to allow the holder of the note to put his notice in the post on the day following that of the dishonor, after the latest post of that day had departed, and that, if any inconvenience should be occasioned by the departure of the post early in the morning, it would be more reasonable and just that he should be subjected to it, than that the rule requiring the notice to be dispatched during the day following that of the dishonor of the bill should be violated, to the delay and injury of the other party. After reviewing at length the authorities on the question, he expressed his conviction that the rule laid down by Bayley and Chitty, that the notice must be given or forwarded before the close of the day following that of the dishonor, had become the settled law both in England and in the United States.

CITED in *Smith v. Pollon*, 23 Hun, 631, as a case in which is considered the question, what constitutes reasonable business hours.

NOTICE OF DISHONOR OF NOTE SENT BY MAIL of the day following that on which the protest was made, is sufficient: *Bank of United States v. Merle*, 38 Am. Dec. 201, note 203, where other cases are referred to.

DUNCAN v. SYLVESTER ET AL.

[24 MAINE, 482.]

DEED CONVEYING ONE HALF OF A TRACT OF LAND "containing fifty-two acres and eighty rods and no more, and including the salmon fishery contiguous to said land," conveys only an undivided half of the salmon fishery.

CONVEYANCE BY METES AND BOUNDS OF PORTION OF COMMON ESTATE, by one tenant in common, is void, and not merely voidable at the election of the co-tenant.

OWNER OF LAND ADJOINING TIDE-WATERS IS PROPRIETOR OF THE FLATS to low-water mark, not exceeding the distance of one hundred rods, subject to the right of free fishing of each householder in the waters covering them. But the right to erect weirs upon those flats, or to set nets or seines, "making them fast in the usual way, by grapplings to the shore," belongs exclusively to the proprietor of the flats.

TENANT IN COMMON OF RIGHT OF FISHERY, MAY, WITHOUT REGAINING POSSESSION thereof, by entry or otherwise, maintain an action against his co-tenant for depriving him of such right

TRESPASS on the case against the defendants for cutting away the plaintiff's nets, and depriving him of his rights of salmon fishery. The plaintiff, to show title in himself, introduced a deed from Abner Knight to Samuel Duncan, dated July 19, 1819. It also appeared that Sylvester owned an undivided one half of the premises, which he claimed under a deed from Abner Knight to George Knight, dated July 18, 1817, and a deed to himself from George Knight, dated June 20, 1833. The plaintiff proved that on May 19, 1834, he went to said salmon fishery,

and attempted to set his net, but the defendants, who had previously set their nets there, forbade him to set his net, and denied his right to any part of the fishery. The verdict was for the plaintiff, and the defendant excepted. The other facts sufficiently appear from the opinion.

W. G. Crosby, for the defendants.

F. Allen, for the plaintiff.

By Court, SHEPLEY, J. This bill of exceptions presents three questions for consideration: 1. Whether the deed from Abner Knight to George Knight conveyed the whole or an undivided half of the salmon fishery. 2. Whether a conveyance made by one tenant in common of a portion of the common estate by metes and bounds be void as against a co-tenant, or valid until he give notice to the grantee, that he elects to avoid it. 3. Whether the plaintiff be entitled to recover damages for being kept out of the occupation of any portion of the salmon fishery, after he was deprived of it, without having first regained possession by entry or otherwise.

1. The description of the estate conveyed by the deed from Abner to George Knight, is "one undivided moiety or half part of a certain lot or tract of land situate in Northport aforesaid, and butted and bounded as follows, viz.:" it then proceeds with a particular recital of the metes and bounds of the lot, and concludes with these words, "containing fifty-two acres and eighty rods and no more, and including the salmon fishery contiguous to said land." Was the fishery included in the lot, half of which was conveyed, or included in the conveyance as a distinct portion of property? There is no indication of an intention to convey two distinct pieces of property, the one being an undivided half of the lot, and the other the entire salmon fishery. The grammatical arrangement of the language is opposed to such a construction, and is suited to convey an undivided half of the fishery as a right appertaining to the lot. The word "containing," is clearly connected with the word lot, or tract, as its substantive, showing, that the whole lot contained a certain number of acres and rods. The word "including," is coupled to it, and must have the same antecedent, showing, that the lot included the fishery. No other construction can be admitted without doing great violence to the language.

2. It appears to have been held, in the case of *White v. Sayre*, 2 Ohio, 110, that a tenant in common could legally convey a particular part of his undivided share of the estate. If this

were admitted to be the established law, the other tenants in common, without any fault of their own, would be deprived of their right to enter and occupy every portion of the common estate, and of their right to have any portion of it thus conveyed, assigned to them on a partition of the common estate. Nor can the co-tenant justly be required to give notice to the grantee. If he were, he might become a trespasser, before he was aware of the existence of such a conveyance. He may entirely disregard it, and proceed to occupy any portion of the estate as freely as before such a conveyance, because it can have no legal effect upon his rights: *Bartlet v. Harlow*, 12 Mass. 848 [7 Am. Dec. 76]; *Mitchell v. Hasen*, 4 Conn. 495 [10 Am. Dec. 169]; *Cogswell v. Reed*, 3 Fairf. 198.

3. For the purpose of ascertaining, what damages the plaintiff may be entitled to recover, it may be well to determine what right or property he had in the salmon fishery. The deeds, from which both parties claim to have derived their rights, assume to convey a salmon fishery as contiguous to the lot of land, which adjoins the Penobscot bay. The verdict in this case, founded upon the testimony introduced, shows that such a fishery may be a valuable property, if it can have a legal existence. The state may regulate its navigable waters, and the fisheries within them; yet all the citizens are entitled as of common right to the fish in those waters; while each is bound to use this common right as not abusing it; and no one can unnecessarily interfere with or injure another in the use of the same right. It does not, however, follow, that each will be entitled to enjoy precisely the same or equally valuable rights. The owner of the land adjoining tide-waters becomes, by the ordinance of 1641, the proprietor of the flats to low-water-mark, not to exceed the distance of one hundred rods, subject to the free fishing of each householder in the waters covering them. But the householder, or citizen, does not thereby become entitled to place weirs, or other permanent erections, upon those flats, or to set his nets or seines, "making them fast in the usual way by grapplings to the shore." These are advantages often of great value, which the riparian proprietor has over others. Having a common right with others to fish in those waters, he may, without any unreasonable exercise of that right, or improper interference with the rights of others, avail himself of these superior advantages. This is believed to be the foundation, upon which the valuable private rights or privileges of fishery, often conveyed and leased by one to another for no inconsiderable amount of money, rest. And their

existence as private rights, appears to have been recognized in the legislation respecting the fisheries. The fishery in this case, described as contiguous to the land, appears to have been occupied since 1819, if no longer, as a privilege for two strings of nets only, which were made fast by grapplings to the shore. Since the year 1833, Ingraham Duncan and Gilmore Sylvester appear to have been the owners in common of the tract of land, to which this fishery was contiguous. In the month of April or May, 1834, Ingraham Duncan leased one half of that fishery to the plaintiff. This would convey to him the right, in common with the owner of the other half, to use the privilege with the advantage of fastening his nets by grapplings to the shore. This right, so secured to him by lease, may be properly denominated an incorporeal hereditament, which is described in the books as a right issuing out of a thing corporate, or concerning, or annexed to, or exercisable within, the same. Thus a right of common, being a profit which one has in the land of another to pasture his cattle, to catch fish, to dig turf, to cut wood, to travel over, and the like, is an incorporeal hereditament.

The lease or conveyance of a right to make grapplings fast to the shore, for the security of nets, can no more be considered as conveying title to any portion of the estate, than a conveyance of a right of way, or a right to dig turf could be. If one, who had a private fish pond upon his own land, should grant a piscary out of it with the right of fastening nets to the bank, such right or privilege would still be but an incorporeal hereditament. They would be properly so denominated, because in none of these cases would any title to the land pass to the grantee: Co. Lit. 4 (b); Com. Dig., Piscary, A. They are rights merely, incorporeal, intangible, incapable of a *pedis possessio*; and properly speaking, one can not be dispossessed of them; for they are always considered to be in the possession of those having a right of possession or enjoyment: Cru. Dig., tit. 35, c. 13, sec. 13. Of course, although one may be disturbed, or prevented from enjoying them, he can make no entry to regain possession; or maintain any action to regain possession of that, which the law adjudges to be already in his possession, and of which it declares, that he can not be dispossessed. The objection can not therefore be a valid one, "that he was not entitled in this action to recover damages for withholding the possession until he first regained the possession by entry or otherwise." And the authorities relied upon to support it can not be applicable to this description of property. An action on

the case is the proper remedy for one injured by the disturbance or deprivation of the enjoyment of an incorporeal hereditament: Com. Dig., Action on the Case for a Disturbance, A.: *Stocks v. Booth*, 1 T. R. 428. It may be maintained by a tenant in common of such a right, and he may recover damages against his co-tenant for a continued disturbance or deprivation of the enjoyment of it.

The case of *Atkinson v. Teasdale*, 3 Wils. 278, was an action on the case for the disturbance of a common of pasture by a tenant in common against his co-tenant. The declaration alleged a disturbance on a particular day, "and on divers other days and times between that day and the suing forth of the original writ." The plaintiff obtained a verdict, and judgment was entered upon it. The case was much contested and twice argued, but no objection was taken to the plaintiff's right to recover for the continued wrong. The case of *Blissett v. Hart*, Willes, 508, was a like action for the disturbance of a ferry, against one who had set up another ferry near to it. The declaration alleged the injury on a certain day, and continued on divers other days and times. The plaintiff had judgment. This also was a case much contested and twice argued on a motion in arrest of judgment. The forms for the disturbance of such rights in the best precedents for declarations, contain a clause for a continuance of the wrong. And there is little reason for requiring numerous actions to be brought for each disturbance, when entire redress may be obtained by one without a violation of any rule of law. It is difficult to perceive any sufficient reason for the application of a different rule to actions of this description from that, which prevails in actions on the case for other injuries, and in actions of trespass. And it is well settled, that entire damages may be recovered in the latter class of actions for a repetition and continuance of the injury, as well as for the first injurious act.

The case of *Winsmore v. Greenbank*, Willes, 577, affords a remarkable instance of such a recovery in an action on the case, for enticing away the wife of the plaintiff, and inducing her to conceal herself from him, and for a continuance of the injury from August 8 to December 24, 1742. The plaintiff obtained a verdict for heavy damages. The case was argued on a motion to set aside the verdict as against the evidence, and for excessive damages, and on a motion in arrest, and without success. The arguments to set aside the verdict do not appear in the report of the case. That it could not have escaped their notice, that damages were given for a continuance of the injury is apparent, for

the opinion states a distinction in this respect between the commencement and the continuance of a nuisance; that notice was required for its removal, before damages could be recovered for its continuance; and that such a rule was not applicable to that or other actions on the case for a different injury, "because every moment that a wife continues absent from her husband, it is a new tort." Indeed it would seem to be more reasonable to require one, who had been injured by several distinct acts of trespass, committed at different times by the same person, to commence different actions of trespass to recover his damages, than it would to require the plaintiff to commence several actions on the case for each separate injurious act, showing a continued deprivation of his right to enjoy the same fishery. The policy of the common law and of our legislature is to prevent a multiplication of suits, whenever it can be done without introducing confusion of rights, surprise upon parties, or practical inconvenience or injustice. And none of these results will be produced by allowing the plaintiff in this case to recover for a continued deprivation of the enjoyment of his rights.

It is further insisted in the argument for the defendants, that the plaintiff can not recover against both the defendants for such a continued disturbance. It might be sufficient to observe, that such a point does not appear by the bill of exceptions, to have been made during the trial. It is obvious, however, that if made, it must have presented a question of fact for the decision of the jury, whether both of the defendants continued to act together and to deprive the plaintiff of the enjoyment of his rights. And it does not appear, that any incorrect instructions were given respecting it, or that any requested were refused. The bill of exceptions does not recite the testimony introduced in the case. There is no motion to set aside the verdict as against the evidence, and if there were, the court has no means for determining, whether the jury were authorized by the testimony to find, that both the defendants were alike guilty. The jury were required by their instructions to find, that the plaintiff was kept out of the occupation of his half of the fishery by the defendants, not by one of them, during the whole time, for which the damages were assessed.

There is nothing in the case authorizing the court to determine, that they were not fully justified by the testimony in coming to that conclusion.

Judgment on the verdict.

CITED in *Gates v. Salmon*, 35 Cal. 588, to the point that one tenant in common can not convey a specific part of the land to the prejudice of his co-tenant.

TENANT IN COMMON CAN NOT CONVEY BY METES AND BOUNDS: See *Dennison v. Foster*, 34 Am. Dec. 429, note 431; *Smith v. Benson*, 31 Id. 614, note 616, where other cases are collected.

WARREN v. WHITNEY.

[24 MAINE, 561.]

PROMISE TO PAY DEBT WHICH HAS BEEN VOLUNTARILY RELEASED is without legal consideration, and is, therefore, not binding upon the promisor. MORAL OBLIGATION TO PAY DEBT DOES NOT CONSTITUTE LEGAL CONSIDERATION for a promise to pay it, in a case where the debt has been voluntarily discharged.

THE opinion states the case.

Howard and Shepley, for the plaintiff.

Barnes and E. H. Daveis, for the defendants.

By Court, SHEPLEY, J. It appears from the case stated, that the defendants were indebted to the plaintiff before January 16, 1836, on a promissory note; and that on that day they made an assignment of their property for the benefit of their creditors. The assignment contained a release of all debts due from the defendants to their creditors. The plaintiff became a party to it, and thereby released his debt, and received a dividend upon it from the assignees. The defendants, by a contract in writing, made on March 14, 1836, promised to pay the plaintiff any balance of the debt, which might remain unpaid by the assignees. And they afterward paid a small amount of such balance. The plaintiff having voluntarily released his debt upon an agreement to receive his proportion of the property conveyed to the assignees, the transaction was equivalent to an accord and satisfaction. There was no longer a subsisting debt due from the defendants to the plaintiff; and no consideration for the new promise; unless a moral obligation to pay a debt, which has been discharged by payment of part only, can be considered sufficient.

This court had occasion to consider and to deny, that a moral obligation can constitute in all cases a legal consideration for a contract, and to lay down some rules respecting it, in the case of *Furnham v. O'Brien*, 22 Me. 475. It was there stated, that when a person had received a benefit from, or occasioned a loss

to, another, and a statute or rule of public policy protected him from making compensation, the moral obligation to do it remained, and would constitute a legal consideration for a promise to do it. When a debt has been voluntarily discharged, a case is not presented within the rule. The case of *Willing v. Peters*, 12 Serg. & R. 177, would however authorize the plaintiff to recover in this case. The authority of that case must be considered as essentially impaired, if not wholly destroyed, by the case of *Snevily v. Read*, 9 Watts, 396. In the latter case, the plaintiff had discharged the defendant from custody under a *ca. sa.*; and thereby discharged the debt. The defendant subsequently promised to pay it; and the court considered, that there was no legal consideration for the promise. The case of *Stafford v. Bacon*, 1 Hill, 533 [37 Am. Dec. 366] decided, that a promise to pay a debt voluntarily discharged, was not binding for want of a legal consideration.

The counsel for the plaintiff insist upon a distinction, that when the release is made at the request and for the benefit of the debtor the new promise is binding; and that when not so made, it is not. The case of *Valentine v. Foster*, 1 Metc. 520 [35 Am. Dec. 377], is referred to as establishing such a distinction. If the debt be released for the benefit of the debtor, it is not the less perfectly discharged. When a moral obligation has been properly held to constitute a legal consideration, a plea of accord and satisfaction could not have been supported. The party must have pleaded a statute bar, or facts to bring his case within some rule of public policy forbidding a recovery, such as infancy, or coverture. There is little similarity between such cases, and a case, in which a party could have pleaded and have sustained his plea, that he had satisfied and paid the debt.

A nonsuit is to be entered.

CITED in *Mason v. Campbell*, 27 Minn. 55, to the point that where an original right of action is extinguished by the voluntary act of the parties, a new promise does not revive the original debt, but is without the consideration.

MORAL OBLIGATION AS CONSIDERATION FOR PROMISE TO PAY ANTECEDENT DEBT: See note to *Earnest v. Parke*, 27 Am. Dec. 288.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

JONES v. PLATER, ADM’R.

[2 GILL, 125.]

“MORE OR LESS”—AN AGREEMENT TO BUY AT A SPECIFIED PRICE PER ACRE, if the agreement contain an estimate of quantity, as being “— acres, more or less,” is an agreement to pay at the stipulated price, for the number of acres as estimated, though this be more than the tract actually contains.

IDEM—THE WORDS “MORE OR LESS” EXCLUDE THE IDEA that a seller intended to bind himself that the actual quantity should correspond to the estimate.

BILL in equity for a specific performance. Under the agreement of the parties, the only question submitted for determination was as to whether the purchasers should pay for the nine hundred and ninety-eight and one half acres, the acreage at which the tract was estimated in the contract of sale, or for nine hundred and forty-three acres, the quantity found to be in the tract by the actual survey. From the decree below, which established that the purchaser should pay for the nine hundred and ninety-eight and one half acres, an appeal was taken.

A. Randall, for the appellants.

J. Johnson, *contra*.

By Court, **ARCHER, J.** The determination of this case depends on the construction of the contract of the parties, of the thirtieth of November, 1816. The question to be decided is, whether the parties intended that the number of acres should be fixed by the contract, at nine hundred and ninety-eight and one half

acres, or whether it was designed that the quantity should be ascertained by measurement and paid for, according to the number of acres the land should actually contain. The words of the contract are: "the said John R. Plater sells to the said John Darnall a part of a tract of land called Great Elkton Head Manor, including the mill-seat and the mill, supposed to contain nine hundred and ninety-eight and one half acres, more or less, at nine dollars per acre." The insertion in the contract of the terms "more or less," induces us to believe it to be the intention of the parties that the land to be paid for was nine hundred and ninety-eight and one half acres; and not that the quantity to be paid for was to be that which it should be found actually to contain. Unless the words "more or less" lead to such a conclusion, they are useless and insensible. The contract must be interpreted by its terms, and from an examination of its terms alone, we have arrived at the conclusion above stated. If it were competent to look out of the instrument, the intention of the parties clearly appeared on the first of November, 1816, by the agreement of that day, that the sale should be of nine hundred and ninety-eight and one half acres, at nine dollars per acre, whether it contained more or less; and we do not see in the agreement of the thirtieth, any change of intention, although the design of the parties is not so clearly and decisively expressed. The letters of Mr. Plater if used in evidence, show nothing to the contrary; the land sold was part of a tract from which other sales had been made, and a survey was necessary to enable Plater to convey, as he would be bound to do on the payment of the purchase money. If he therefore joined in the survey, or aided in it, no inference against the above interpretation could be deduced from such conduct.

The land thus appears to have been sold by estimation; and so much is to be given by the acre for the quantity, more or less. The quantity of acres was manifestly not considered as of the essence of the contract, neither warranted on the one side, nor demanded on the other. The deficiency in the quantity is inconsiderable, and is not of such a character as to induce the belief of fraud or mistake. We can not more intelligibly express our views, than in the language of Judge Story: "There is much good sense in holding that the words more or less, or other equivalent words, used in contracts or conveyances, should be construed to qualify the representation of quantity, in such a manner, that if made in good faith neither party should be entitled to any relief on account of a deficiency or of a surplus."

Prop'rs of Kennebeck Purchase v. Springer, 4 Mass. 417 [3 Am. Dec. 227]. We therefore think, this is no case for an abatement of the purchase money.

The agreement in the record would seem to preclude the examination of any other questions, than those which we have examined.

Decree affirmed.

"MORE OR LESS."—These words, when used in conjunction with an estimate of quantity, exclude the idea of any warranty or representation that the tract sold contains the number of acres stated in the contract, and there can therefore, in such case, be no claim upon the part of the purchaser for a rebate, if there prove a deficiency: *Tyson v. Hardesty*, 29 Md. 309; *Slothower v. Gordon*, 23 Id. 10; *Stull v. Hurtt*, 9 Gill, 450. In the case of *Hall v. Mayhew*, 15 Md. 558, a farm sold for a sum in gross was described as containing four hundred and eighty-two acres, *more or less*, and was found upon actual survey to contain but three hundred and seventy-eight acres; and yet, notwithstanding the great deficiency, the rule was applied, and the purchaser denied any right to a rebate. All of these cases cite the principal case. But see *Couse v. Boyles*, 38 Am. Dec. 514, where it is said that though lands be sold as containing so many acres more or less, yet if the parties contemplated that the land contained a number of acres commensurate with their estimate, a rebate must be made if it is subsequently found that the estimate varies materially from what the tract actually contains. See also note to that case.

BYER v. ETNYRE AND BESORE.

[2 GILL, 150.]

WORD "LEVY" IN A RETURN TO A FIERI FACIAS sufficiently indicates that there has been a seizure of the property of which the levy is predicated.

TITLE OF A PURCHASER AT AN EXECUTION SALE DEPENDS in no wise upon the officer's return, but instead upon the fact of there having been a seizure and sale; therefore, if the return does not show the existence of these facts, they may be shown by evidence *aliunde*.

FAILURE IN AN ACKNOWLEDGMENT TO SHOW THE OFFICIAL CHARACTER of the person by whom it was taken, is not fatal, and may be remedied by evidence of such official character.

DELIVERY IS A FACT DEPENDENT UPON INTENTION, and must be determined by the jury from a consideration of the whole evidence.

ASSUMPT. Etnyre and Besore, plaintiffs below, had obtained judgment against Mayhue and Lowman, which they caused to be levied upon a crop of grain, then being grown by them upon the land of Frederick Zeigler, under an agreement to give the latter one half of the crop to be raised for the use of the land. At the sale, in pursuance of the levy, the interest of the said Mayhue and Lowman was bid in by Byer, defendant below, but

at the time it being understood that Zeigler asserted some claim to the tenant's interest in the crop, it was agreed that Byer's obligation to pay should depend upon whether any right to that interest did or not exist in his favor. On the trial defendant attempted to show such interest by introducing in evidence a copy of the record of a bill of sale, filed in the recorder's office of Washington county, and executed by the said Mayhue and Lowman to Zeigler, for their interest in the growing crop sold under execution. This bill of sale was, however, excluded by the court, because the acknowledgment thereto failed to show that it was taken by any one acting in an official character, though the defendant offered to remedy this defect by introducing evidence to the effect that the person by whom said acknowledgment was taken was a justice of the peace of Washington county. To this exclusion of the instrument defendant excepted. He also excepted to the ruling of the court admitting in evidence the writs of *feri facias*, under which the sale to him was made, and the indorsements by the constable thereon, upon the ground that the latter did not show the property sold to have been actually seized, as they only stated that said property had been levied upon. Other exceptions were taken, the nature whereof will appear from the opinion. Plaintiffs obtained a verdict.

Weisel and Price, for the appellant.

Mason and F. A. Schley, contra.

By Court, DORSEY, J. The county court, we think, committed no error in overruling the appellant's objections to the admissibility of the writs of *feri facias*, and the indorsements thereon. The first of which is, "that the indorsements on the said writs do not sufficiently show a levy upon, or seizure of the grain in question." There is no precise form of return to such executions prescribed by law; and that made by the constable on this occasion, as far as this objection is concerned, is in accordance with the returns usually made by such officers; and by common usage and acceptance, the term "levied" when thus used by constables, imports a seizure. But suppose the facts were otherwise; seizure is a matter *in pais*, which may be proved by parol evidence, and was so proved by the constable who made the same, prior to any objection being taken to the testimony. It is not the constable's return which gives title to a purchaser under a *feri facias*; but the seizure and sale under the writ. And the constable's return is evidence, but not the only admis-

sible evidence of those facts; a statement thereof, in the receipt for the purchase money given to the vendee, would be as effectual to transfer the title to personal property, as the most formal return indorsed on, or attached to the writ; and if there had been no return made, nor receipt given by the constable, and the seizure, sale, and payment of the purchase money were established by oral testimony only, the title of the purchaser would be equally good. The remarks made upon the first objection are, for the most part, equally applicable to the second. The parol evidence of the constable obviating the defects, imputed to the returns made to the writs of *feri facias*.

The only question raised on the second bill of exceptions in the court below, and on which the court decided, was, whether a bill of sale, under the act of 1729, chapter 8, which enacts, "that from and after the end of this session of assembly, no goods or chattels, whereof the vendor, mortgagor, or donor shall remain in possession, shall pass, alter, or change, or any property thereof be transferred to any purchaser, mortgagee, or donee, unless the same be by writing, and acknowledged before one provincial justice, or one justice of the county where such seller, mortgagor, or donor shall reside, and be within twenty days recorded in the records of the same county," was admissible in evidence, where the magistrate, who took the acknowledgment, omitted to state therein the official character in which he acted; and where it was admitted by the parties in the cause, that the person before whom the acknowledgment was made, was, at the time thereof, a justice of the peace of the state of Maryland, in and for Washington county, duly commissioned and qualified as such. The only ground assigned for the rejection of the testimony offered, was, that the person who took the acknowledgment did not, upon its face, make any mention of his official character, or state himself to be a justice of the peace. Which objection to the evidence offered, the bill of exceptions states, that "the court sustained, upon the ground aforesaid, and refused to permit the said instrument of writing to be read to the jury." The act of 1729, prescribes no form of acknowledgment to be taken by the justice; much less does it require that the authority of the justice to take the acknowledgment, should appear upon its face. With equal, if not greater propriety, might it be insisted, that where the acknowledgment is made before a justice of the county, it should state, that the person was a resident thereof, who made the acknowledgment. Without such residence, the writing acknowledged is as inoperative

and void, as if the person taking the acknowledgment were not a justice of the county. And yet, perhaps not an instrument of the kind can be found, where the acknowledgment contains any such assertion of residence. And should the acknowledgment, contrary to the fact, state the residence of the party to be in a different county from that of the justice, the erroneous statement might be disproved, and the instrument acknowledged, established in its operation under the act of 1729; although upon the face of the acknowledgment it appeared to be a nullity: see the case of *Gittings v. Hall*, 1 Har. & J. 18 [2 Am. Dec. 502]; and so, if the acknowledgment had stated the person taking it to be a justice of the county, when, in truth, he was not so, the falsehood might be proved, and the instrument invalidated. And, *a fortiori*, may the defect be supplied, by testimony *aliunde*, where the acknowledgment omits to state the official character of him, by whom it was taken. And the proof offered, even if not admitted to be true, as was the case on this occasion, was much stronger and more conclusive evidence of the fact of official authority, than would have been the mere statement thereof, in the body of the acknowledgment.

This view of the case we think fully sustained by the opinion of this court in *Connelly v. Bowie*, 6 Har. & J. 141, where in an action of ejectment, a certified copy of a deed was admitted as evidence by the county court, although the acknowledgment thereto, neither stated the official character of the persons taking it, nor the county in which it was taken. This court, in reviewing the judgment of the county court, say: "The official character of the persons before whom the supposed acknowledgment was taken, does not appear on the face of it, and the paper is equally silent as to the county in which the acknowledgment was taken; nor is there any proof in the record showing, that John Ball and Turner Wootton were justices of the peace; or that the acknowledgment was made in the county in which the lands were then situate;" and for these reasons reverse the judgment of the county court. Is not the inference irresistible, that had there been proof in the record, *dehors* the certified copy produced, showing that John Ball and Turner Wootton (the persons before whom the acknowledgments were taken) were justices of the peace of, and that the acknowledgment was made in, the county in which the lands were situate, the judgment of the county court would not have been reversed, for the defects appearing on the face of the deed; the copy whereof had been admitted by the county court, in evidence to the jury?

But, although the county court, in the case before us, erred, in refusing to permit for the reason assigned, the instrument of writing to be read to the jury, as offered by the appellant, yet its refusal was justified upon a ground which does not appear to have been brought to its notice, but which this court are not at liberty to overlook. By the act of 1729, chapter 8, under the provisions of which the bill of sale before us was taken; its being recorded within twenty days "in the records of the same county," is as necessary to its validity, as is its acknowledgment. The record contains no evidence of such recording: the usual certificate thereof, by the county clerk, not appearing by the record to have been indorsed on the bill of sale. It is true, that preceding the bill of sale there is the following written statement, viz.: "At the request of Frederick Zeigler the following bill of sale was recorded, May 24, 1841." But this statement is signed by nobody; and where or by whom recorded, *non apparet*. The third bill of exceptions having been abandoned, this court are relieved from its consideration.

We concur with the county court, in its rejection of the appellant's prayer, in the fourth bill of exceptions, that if the jury "believe from the evidence, that the said Frederick Zeigler had permission and authority from the said Mayhue and Lowman, before the delivery of the said writs of *feri facias*, to the constable, to proceed and sell said grain in the ground, for his own use, and that the permission and authority were given on the premises, and in view of the said grain in the ground; and that the said Zeigler did thereupon proceed to advertise the said grain for sale, before said writs of *feri facias* were so delivered, that the said facts amounted to a delivery of the said grain to the said Zeigler, and the plaintiffs are not entitled to recover." Before the court could grant the prayer thus made to it, it must assume the non-existence of all the other oral testimony given in the cause; because, by the prayer, no part of it is submitted to the finding of the jury. In the absence of all proof, that any consideration was paid for the said permission and authority: or, that it was delegated by Mayhue and Lowman to Zeigler, on account of any debt due from the former to the latter; or for what purpose this delegation of power was made; to call on the court below to deduce the fact of the delivery of the grain to Zeigler, from the facts submitted by the prayer to the finding of the jury, was to ask the court to transcend its jurisdiction, and exert a power exclusively within the cognizance of the jury. The authority delegated, and its incipient exercise by Zeigler, are

perfectly consistent, either with the delivery or non-delivery of the grain. Delivery, in this case, was a fact dependent upon the intention of the parties, to be passed on by the jury, upon evidence being offered, which was legally sufficient for them to assume its existence. And so far from the court granting the appellant's prayer, upon the finding by the jury of the facts enumerated, with equal if not greater propriety might the appellees have prayed an instruction from the court to the jury, that from their finding, only, the facts submitted to them in the appellant's prayer, they were not warranted in finding the delivery of the grain to Zeigler.

Concurring in opinion with the county court, in its admission of the testimony stated in the first bill of exceptions, and in its refusal to grant the appellant's prayers in the second and fourth bills of exceptions, we affirm its judgment.

Judgment reversed.

See *contra*, that an acknowledgment is entirely void if it do not show the official character of the person by whom it is taken, *Johnson v. Haines*, 15 Am. Dec. 533.

BEALL AND McELFRESH, ADM'RS, v. SCHLEY.

[2 GILL, 181.]

WILL CAN NOT DISPOSE OF REAL ESTATE acquired after the date of its execution, however clearly expressed the intention of the testator, unless there is republication of the will.

DOCTRINE OF ELECTION APPLIES as well against the heirs of the testator as against other persons.

IDEM—CLAUSE IN A WILL INTENDED TO PASS AFTER-ACQUIRED REAL ESTATE raises a case of election, and requires the testator's heirs either to renounce the benefits conferred by the will, or else their right in such after-acquired estate, in favor of the intended devisee.

PRINCIPLE OF ELECTION REQUIRES that no person claiming under an instrument shall be allowed to defeat its provisions.

IDEM—ELECTION BY HEIR TO TAKE AS HEIR, AND CONSEQUENT WAIVER of a life estate given to him by the will, does not in any manner affect the estates of the remainder-men, and they will take in the same manner as if he had elected to take his life estate under the will.

BILL in equity. The nature of the case appears in the opinion.

Palmer and Reverdy Johnson, for appellants.

William Schley, *contra*.

By Court, **ARCHER, J.** The controversy in the present case, arises under the will of Caspar Mantz; and grows out of the fol-

lowing clause in the will: "And furthermore, I do hereby make and constitute my sister Theresa, my residuary legatee and devisee; and I do hereby give and bequeath to her all my money, choses in action, and all the rest, and residue, and remainder of my property, real, personal, and mixed (not hitherto devised or bequeathed), of which I am now possessed, or of which I may be possessed, at the time of my death; to her, my said sister Theresa, her heirs and assigns forever." Which said will was executed on the ninth day of August, 1832.

On the eighteenth of March, 1835, he purchased of a certain Joseph Kenega, a valuable farm, near Fredericktown, for which he duly obtained a conveyance; and died on the twenty-ninth of October, 1839. It appears by the facts in the case, that the testator left three sisters, Mrs. Harding, Mrs. Barr, and Mrs. McElfresh; and that Mrs. McElfresh is his residuary legatee and devisee. Among other things, the testator devised to John McElfresh, in fee, the husband of the residuary legatee and devisee, certain real estate; and fifteen thousand dollars in cash, in trust for the use of Mrs. Harding, for life, and after her death, the whole of the said property to go to Mrs. Harding's children; as in the will is particularly specified. A devise of certain real estate, and thirty-two thousand dollars, besides bank and turnpike stocks, particularly specified in the will, was made to the same trustee for the benefit of Mrs. Barr, for life, and after her death, for the benefit of her children; as set forth particularly in the will. He also devised sundry lands to Mrs. McElfresh, her heirs, and assigns; and in the conclusion of his will, constituted her residuary legatee and devisee, in the terms which have been before set forth.

The question submitted to us under the will, above adverted to, as appears by the agreement and statement in the record, is, whether Mrs. Barr, by her trustee, can claim the property devised in trust to her by the will of Caspar Mantz; and also, as heir at law, the one third of the value of the Kenega farm, purchased by Caspar Mantz after the execution of his will? The will not having been republished, it is conceded, that the after-purchased lands never passed under it; no matter how clear may be the intention of the testator, in the clause under consideration, to pass them. The answer to the question will be found in the solution of the inquiry, whether the case is one for election, according to the principles of law applicable to such doctrine? The inapplicability of the doctrine of equitable election, to this case, has been urged upon several grounds: 1. On the

intention of the testator, as deduced from the residuary clause. 2. Its inapplicability to an heir at law. 3. Its supposed inapplicability to a clause in a will, which, although it may manifest the intention of the testator, is in itself inoperative to pass any estate by the rules of law. And, 4. On the ground that the case before us, if the intention were even clear, and if applicable to an heir at law, is not of such a character as comes within the most approved definition of the doctrine.

1. No person will be compelled to make an election, unless the intention of the testator be sufficiently made out. There never can be a case of implied election, but upon a presumed intention of the testator: *Baugh v. Reed*, 3 Bro. Ch. 191; S. C., 1 Ves jun. 257; *Grosbie v. Murray*, Id. 557. The degree of intention necessary to raising a case of election, must plainly appear upon the face of the will. On the other hand, it is said, the court is not to refuse attention, to what amounts to a moral certainty of the testator's intention; where that is to be gathered, either from the state of the property, or the purview of the will: *Blake v. Bunbury*, 4 Bro. Ch. 24.

What was then the intention of the testator in the residuary clause? It is supposed that the residuary clause may be construed, so as only to show an intent to pass that which should constitute a residue of his then existing property, at the time of his death; and not property, which, after the execution of his will, he might acquire. Such a construction would make the testator guilty of the folly of supposing, that without such clause, either the residue at his death would not pass, by the term, "of which I am now possessed," or that any portion of his property, constituting a part of the residuary, if disposed of by him in his life-time, would pass under the will: a supposition we should not be justified in making, when the words themselves have so plain an import. His design is declared in express terms, to make her his residuary devisee; and of what, he explicitly announces, by devising the remainder of the property, of which he was then possessed, or of which he might be possessed at the time of his death; the term "which," referring in the mind of the testator to the word "property," and not to the word "remainder." It then stands as a devise of all the estate of which he died possessed, or of which he might be possessed at the time of his death.

We agree with the vice-chancellor in *Churchman v. Ireland*, 4 Sim. 520, that such words show in a most marked manner, that he intended to pass, not only the estates he had at the date of

the will, but all that he should be in possession of at the time of his decease. It can not be denied, that the words would pass all the personal estate, that the testator was possessed of at his death; and if it is clear as to future personal estate, how can it be said he had not the same intention as to real estate, when they are both disposed of in the same sentence? Can any one say, that he had one intention as to personal estate, and a different intention as to the real estate, when he uses "the same words as to both"? And he overrules a contrary construction put upon words of the like import, in *Back v. Kett*, Jacobs, 534.

2. That this doctrine is applicable to an heir at law, is clear from the authorities. *Smith v. Goodman*, 2 Vern. 586; *Wilson v. Lord Townshend*, 2 Ves. jun. 696; *Birmingham v. Kirwan*, 2 Sch. & Lef. 449; 2 Story's Eq., note 338; *Cavan v. Pulleney*, 2 Ves. jun. 544, 559; *Welby v. Welby*, 2 Ves. & Bea. 187, are all cases where the heir at law was put to his election; and in *Blunt v. Clitherow*, 10 Ves. 593, the point was admitted, that the doctrine reached the heir. The same doctrine was applied in 2 Eq. Cas. 2, referred to in 2 Rop. Leg. 405; and in the case of 2 Ves. & Bea. 187, it was applied in a case, in which the devise to the heir was inoperative. In the case of an express condition, there never could have been a doubt, because the testator may annex what condition he pleases to his estate. Why should not election occur in the case of an implied condition, if the intention be plain and clear, as against the heir? It is said that the devise to the heir is read as if it were to him absolutely, if he confirm the will; if not, then in trust for the disappointed devisees as to so much of the estate given to him, as shall be equal in value to the estates intended for them. It is only carrying out a plain intent of the testator, and giving to the residuary devisee, that which the testator intended, and forbidding the heir from taking property not designed for him. From the earliest case on the subject, the rule is, that a man shall not take a benefit under a will, and at the same time defeat the provisions of the instrument. If he claims an interest under an instrument, he must give full effect to it, as far as he is able to do so. He can not take what is devised to him, and, at the same time, what is devised to another; although, but for the will, it would be his: hence he is driven to his election to say, which he will take.

3. But we have seen that the will is inoperative to pass the lands acquired after its execution. Will this fact prevent the application of the doctrine of election? The English cases since the revolution, are, we think, decisive of this subject: *Thellus-*

son v. Woodford, 13 Ves. 219; *Churchman v. Ireland*, 4 Sim. 520; 4 Con. Ch. 412. The first of these cases was affirmed in the house of lords, and is considered, notwithstanding the opinion of Sir T. Plumer, in *Back v. Kett*, Jacobs, 534, as a case of great authority; and is now the settled law of England. We could add nothing to the convincing reasons by which these cases are supported, by the judges who decided them. There are cases of void wills, such as the will by a *feme covert*, or an infant, which certainly, by established cases, will not demand an election; but these have been rightly placed on a ground, which does not affect the present question. So, too, a will not executed and attested according to the statute, creates no case of election from implication. They are considered as no wills; they can not be read as evidence; and there is nothing, therefore, to indicate intention. But in the case before us, the will is properly in evidence; and the intention is clearly indicated. The cases above referred to may be the first in which the law of election was applied to a will, ineffective to pass after-acquired lands; but no case from the English books has been cited against such application, and we consider them as the strongest evidence of the pre-existing law. We have examined an opposing case, *City of Philadelphia v. Davis*, 1 Whart. 509, but can not agree with it, in confining the rule of election to the operative parts of the will, from the fear of being led into error, by endeavoring to give effect to an intention imputed to the donor. It would be only in such cases where the intention was plain, that the rule would or ought to be extended, and when this is clearly ascertained, it would be unbecoming a court of conscience to allow the heir to take the devise to himself, and also as heir, what was manifestly intended for another.

4. The modern English cases do not, we apprehend, extend or enlarge the principle of election. That principle, as applicable to this case, we take to be this; that no one shall be permitted to take under an instrument, and defeat its provisions; or, in the language of Lord Erskine, a person shall not claim an interest under an instrument, without giving full effect to that instrument as far as he can. This is not a new doctrine; it will be found to have been announced as long since as the case of *Noyes v. Mordaunt*, 2 Vern. 581. Lord Redesdale, in *Birmingham v. Kirwan*, 2 Sch. & Lef. 449, 451, says the general rule is, that a person can not accept and reject the same instrument; and he declares it to be the foundation of the law of election, upon which courts of equity, particularly, have grounded a va-

riety of decisions in cases, both of deeds and wills. The complainants allege in their bill, that after the death of the testator, Mrs. Barr was put in possession of the lands devised; that she had ever since been in the enjoyment of the rents and profits; and had received the interest on the bank stock devised to her; and that her trustee had received in pursuance of the will, the sum of thirty-two thousand dollars for her use, and had invested the same; that she had made efforts to procure the payment of the interest from the said trustee, on the money bequeathed to her.

It thus appears, that her trustee and herself, are in possession of all the estate devised to her; and she is claiming, as heir at law, the proceeds of the Kenega farm, purchased by the testator after the date of the will. By the agreement of the parties, it is conceded, that the court may make a decree in accordance with the doctrine of election, and to have the same effect as if a cross-bill had been filed, to compel Mrs. Barr and her trustee to make their election; provided, the court should be of opinion, that Mrs. Barr could not claim the devises and bequests made in her behalf; and also claim, as heir at law, her proportion of the lands purchased after the execution of the will; and that this is a case in which Mrs. Barr should be compelled to make her election.

We have seen, that the case before us is a proper case for election; and we perceive nothing in the character of the trusts, which should forbid its application; or how any injustice could be done to the children of Mrs. Barr, who take, after her death, by the terms of the trust. If Mrs. Barr elected to take the property devised, then all her right and title in the property purchased after the date of the will, would be directed to be conveyed to the residuary devisee. If, on the other hand, she elected to take as heir the after-purchased land, her life estate in the lands devised and in the property bequeathed, would be gone, and would pass to the residuary devisee; such an election, however, would not affect the persons in remainder, who would take their estates in the property devised; just as they would have taken them, if there had been no case of election under the will. We shall, therefore, sign a decree, that Mrs. Barr and her trustee shall, within sixty days after service of a copy of the decree, make her election; either to take under the will, or to take her proportion of the Kenega farm, purchased by the testator after the date of the will; and if she should fail to make her election within that time, that then she shall convey her part of

the said Kenega farm, which descended to her on the death of the testator, to Theresa McElfresh, in fee simple; and the decree shall provide, in case Mrs. Barr should elect to take the land descended to her, instead of the devises and bequests to her by the will, that then she shall account for the sums by her received under the will; and that, thereafter, the said trustee shall hold the property devised and bequeathed in trust for Mrs. Barr, in trust during the life of Mrs. Barr for Mrs. Theresa McElfresh. And that the principles of this decree may be carried into effect, the decree of Frederick county court will be reversed, and the cause will be remanded to Frederick county court.

Decree reversed and cause remanded.

A DEVISE OF PROPERTY OF WHICH THE TESTATOR IS NOT THE OWNER, will raise a case of election requiring the party entitled thereto either to waive his right to the property or else to the benefits conferred upon him by the will: *Barbour v. Mitchell*, 40 Md. 163. A renunciation by a tenant for life of the benefits conferred by a will, and an election to take instead the rights secured by law to such devisees, as were the widow to renounce a life estate secured to her in lieu of dower, and to claim this latter right, does not affect the rights of the remainder-men, and their estate remains vested in them in the same manner as it would have been had the tenant for life elected to take under the will: *Hanson v. Worthington*, 12 Id. 439.

ADDISON v. HACK.

[2 GILL, 221.]

LICENSE WHICH HAS INDUCED EXPENSES ON THE PART OF THE LICENSOR can be countermanded, if at all, only by replacing the latter in his original position and repaying him the amount expended by him.

PAROL LICENSE TO DIVERT A STREAM, executed by the erection of works at a considerable expense, which must be useless if the license is destroyed, and after the consideration agreed upon for the license has been paid the licensor, becomes irrevocable.

CASE, for the diversion of a stream of water from plaintiff's land. The facts of the case appear from the opinion.

Addison, for the appellant.

Richardson, contra.

By Court, DORSEY, J. The only question, discussed by the appellant's counsel, and on which the opinion of this court was called for, on the first bill of exceptions was, whether, as the plaintiff had not located the patents and title papers of his land upon plots returned to the court, under a warrant of resurvey issued for that purpose, he could give such patents and title

papers in evidence to the jury, and prove, that the grievance complained of was perpetrated by the defendant in respect of those lands. In an action relating to lands, if the defendant does not see fit to take defense on warrant, the plaintiff is under no obligation to ask for a warrant to locate his land, or any of the matters in controversy between the parties. Without such plots he may read his title papers in evidence to the jury; prove his possessions under them, and show by oral or other testimony the injury he complains of; and for which he seeks indemnity. The case of *Medley v. Williams et al., Lessees*, 7 Gill & J. 61, the only case relied on by the appellant as sustaining his position, bears no resemblance to the case now before us. There, defense was taken on warrant, and locations made, and this court held that a title paper, of which there was no location, could not properly be offered in evidence, on the well-established principle of correspondence between the pleadings and the proof. But here no warrant of survey being required by either plaintiff or defendant, no plots or locations could be made in the cause. The county court, therefore, are exempt from the error complained of in the first bill of exceptions.

But the county court, we think, erred in rejecting the testimony offered by the appellant in his second bill of exceptions. The plaintiff having offered the testimony stated in the first bill of exceptions, showing the diversion of the stream from its natural channel, on his land, where it was accustomed to flow; the defendant offered evidence to show, that the diversion of the water complained of, was made on the lands of the defendant, above the lands of the plaintiff, and, that it was rather a benefit than an injury to his lands; and that it was made in virtue of a verbal agreement, entered into by the plaintiff and defendant; by which it was agreed, that the defendant might make the diversion, as now complained of, for the purpose of working a mill, to be erected by the defendant on his own land; if he, the defendant, would allow the plaintiff the use of a wagon road, from the lands of the plaintiff, over the lands of the defendant. That, in pursuance of the agreement, the plaintiff used the said road; and the defendant, at an expense of upwards of four thousand dollars (encouraged so to do by the plaintiff), erected the said mill; which mill was of no value, without the said privilege of diverting the water, as aforesaid. That the plaintiff made no objection to the diverting of the stream of water, till shortly after the completion of the mill; when the plaintiff demanded of the defendant a large pecuniary compensa-

tion for the use of the water; and that the dam, erected on the defendant's land for the diversion of the same, should be abated; and, that the aforesaid conduct of the plaintiff was fraudulently designed, for the purpose of extorting money from the defendant. Upon the objection of the plaintiff's counsel, the court refused to permit the foregoing facts to go to the jury: and in so doing, we think, the county court were clearly in error. If admissible for any purpose, the court was not authorized in rejecting the testimony. In mitigation of damages it was surely admissible; but it was admissible, as evidence, upon other grounds, and for other purposes. For even conceding, what we by no means admit to be true, that the aforementioned agreement did not confer on the defendant a privilege or license, to divert and use the water which the plaintiff could not, at pleasure, countermand; yet, as the defendant had done no act towards diverting the water from its accustomed flow, over the lands of the plaintiff, since the countermand, he could not, by such countermand, be rendered a wrong-doer, *ab initio*, or be made responsible in damages for acts done upon his own land, and with the express permission and authority of the plaintiff himself. If ever the maxim "*volenti non fit injuria*," was applicable to any case, it must be conclusive on this.

But, regarding this license as countermandable, upon what terms is the plaintiff to be restored to his former rights? Can he require of the defendant to be at the expense, and endure the labor, of removing structures lawfully erected, and by the express authority of the plaintiff? The manifest injustice of such a requisition, is an answer to the question. How, then, is the plaintiff to be restored to rights which he is authorized to demand? By doing justice to the defendants: by tendering to him the expense which he has incurred, under the license. This principle was announced in the case of *Winter v. Brockwell*, 8 East, 308. Where an action being brought for a private nuisance, by the erection of a skylight over the defendant's open area; at the trial, the defense set up was, that the area, which belonged to the defendant's house, had been inclosed and covered by a skylight, in the manner stated, with the express consent and approbation of the plaintiff, obtained before the inclosure was made; who, also, gave leave to have part of the frame work nailed against his wall. But, some time after it was finished, the plaintiff objected to it; and gave notice to have it removed. But Lord Ellenborough "was of opinion, that the license given by the plaintiff to erect the skylight, having been acted upon

by the defendant, and the expense incurred, could not be recalled, and the defendant made a wrong-doer: at least, not without putting him in the same situation as before, by offering to pay all the expense which had been incurred in consequence of it; and, under this direction, the defendant obtained a verdict." In this case in *East*, there was no consideration given for the license; and the nuisance, by which the plaintiff suffered from the acts done under it, was a serious one; and yet, Lord Ellenborough subsequently, on a motion for a new trial, after stating that he had looked into the books on the point, reiterates the doctrine that he had before laid down, except as to tender of expense to be made to the defendant; and states that in one of the cases to which he refers, "*Haughton, J.*, lays down the rule, that a license executed is not countermandable; but only when it is executory."

The testimony offered by the appellant in the case before us, is not only admissible, but is, if believed by the jury, a conclusive bar to the right of action of the appellee. Such was the decision in the case (almost identical with the present), of *Liggins v. Inge*, 7 Bing. 682, reported in 20 Eng. Com. L. 290; and to that effect are the cases above referred to by Lord Ellenborough; and *Rerick v. Kern*, 14 Serg. & R. 267 [16 Am. Dec. 497]. The opinion now given is not, as was urged in the argument for the appellee, in conflict with the decision of this court, in the case of *Hays v. Richardson*, 1 Gill & J. 366. There the right claimed under an instrument of writing not acknowledged and recorded, agreeably to the registry laws of the state, was a right of way over the lands of the person intending to grant it, and was an use, thereof, to the extent of the right asserted; and came within the very terms of the act of assembly for the enrolling of conveyances, viz.: that "no manors, lands, tenements, or hereditaments whatever, within this province, shall pass, alter, or change from one to another, whereby the estate of inheritance or freehold, or any estate for above seven years, shall be made or take effect in any person or persons, or any use thereof to be made," etc., unless the conveyance be executed, acknowledged, and recorded, in the manner therein prescribed.

But, in the case before us, the appellee passed to the appellant no estate or interest in his land, or any use thereof. He simply agreed to abandon the use of the water, in the manner in which it had been accustomed to flow on his land. And the moment the abandonment was consummated by the execution of the license, the right of the appellee to the use of the water, as it

formerly flowed in its natural channel, became extinct; it was no longer appurtenant to his land; and he, thenceforth, held it as if no such privilege or appurtenance had ever belonged to it. And this view of the subject, in no wise, contravenes the prominent object of our enrollment laws, the protection of purchasers. When a purchaser views the land he desires to acquire, he sees it divested of its water right, and contracts for it accordingly: so that no injustice is done him.

We are not to be understood in what we have said, as countenancing the idea, that a written grant, unacknowledged and unenrolled, of a power similar to that conferred by the license in this case, but which power had not been executed, would be operative and effectual to bar a subsequent *bona fide* purchaser, for a valuable consideration without notice, claiming the water right naturally incident to the lands he had purchased. To interpose such a bar, in such a case, we think the same conformity to the provisions of our registry laws is necessary, that would be required if land were the subject of the conveyance. The doctrine, insisted on in the argument of the counsel for the appellant, that an oral contract, of no validity under the statute of frauds, would obtain such validity, and would enable a party to maintain an action upon it at law, if he could prove that the opposite party perpetrated, or designed to perpetrate, a fraud, when he entered into the contract. A replication charging such fraud to the defendant, in an action at law, instituted on such a contract, would be no answer to the defendant's plea of the statute of frauds. If a party on whom such a fraud has been committed, has relief anywhere, it must be sought in a court of equity; at law it can not be obtained.

Assenting to the opinion of the court, on the first bill of exceptions, but, dissenting from its refusal to admit, in evidence, the testimony offered by the appellant in the second bill of exceptions, we reverse its judgment.

Judgment reversed and *procedendo* ordered.

CHAMBERS, J., dissenting in part. I concur in the opinion expressed by my brother Dorsey, so far as that opinion relates to the case, now for the judgment of this court. To so much of it as relates to the idea, "that a written grant, unacknowledged and unenrolled, of a power similar to that conferred by the license, in this case," etc., I beg leave to be considered as expressing, neither concurrence nor dissent. That question is not involved in the cause now before us, has not been at all argued by counsel, certainly has not been investigated by me; and,

whatever be the law applicable to it, this case will, in no respects, be affected by it. Considering it quite sufficient to examine and decide questions which are brought before us, I am unwilling to prejudice others; not because of any supposed difficulty in the particular case, but on account of the principle.

Referred to in the case of *Long v. Buchanan*, 27 Md. 516, as illustrative of the distinction between licenses revocable and irrevocable. In that case a parol license to go upon land was held irrevocable, because coupled with a grant that could be made by parol.

LICENSE TO OVERFLOW LANDS OF ANOTHER not to be proved by parol: *Seiden-spanger v. Spear*, 35 Am. Dec. 123, and cases upon both sides of this question cited in note.

GIST AND SCOTT, ADM'RS, v. DRAKELY.

[2 GILL, 330.]

INDORSEMENT UPON AN INSTRUMENT UNDER SEAL, to enable the obligor to negotiate the same and to raise money thereon, authorizes the holder to fill in the blank above the indorsement with a promise to pay in case of default by the obligor. The liability of such an indorser is that of an original promisor.

THE LAW CONCLUSIVELY PRESUMES PARTIES TO A CONTRACT TO UNDERSTAND ITS OBLIGATIONS, and evidence is not admissible to show their understanding to have been otherwise.

IT IS NO DEFENSE TO A SURETY FOR A CORPORATION that the obligation of the latter is beyond its powers; his liability remains notwithstanding, if default is made by his principal.

RULE ADOPTED BY A TRIAL COURT, requiring all the evidence to be offered in a case, before any question of law is raised, excepting objections to testimony, is a proper rule, and no one will be heard to complain that he has been injured because of the court's adherence thereto.

ASSUMPSIT. The fifth instruction asked by the defendant below was to the effect, that if the defendant when he indorsed the sealed instruments offered in evidence believed he was assuming the responsibility of an indorser of negotiable paper and the matter was so understood by plaintiff, then the latter could not recover. The other facts appear in the opinion.

Lucas and T. P. Scott, for the appellants.

J. H. B. Latrobe, contra.

By Court, **MAGRUDER, J.** The Eutaw Company, by two instruments, to which its corporate seal was affixed, promised to pay "to the order of David Keener," the sum of money expressed in each of them. On the back of these instruments, David Keener first, and afterwards Gist (the original defendant

in the court below), wrote each of them his name. Before offering these sealed instruments in evidence, the blank that was left over their names, was filled up with these words: "For value received. We jointly and severally, promise David Drakely, to pay him the amount of the within writing obligatory, should the Eutaw Company, the obligees therein named, make default in the payment thereof, when the same shall become due." Upon this, the present suit was brought. The court below, at the instance of the appellee, instructed the jury, that he was entitled to recover in this suit, the amount of said bills, if the same were executed by the Eutaw Company, and indorsed by Keener and Gist, by an agreement with said company, for the purpose of raising money thereon, or purchasing goods, with a view by said indorsement, of giving credit to said company; and if they should find, that the defendant (in the court below), undertook and agreed with said company, to make such indorsement in consideration, that the said company would give him a credit for the amount of said responsibilities thus assumed, upon a claim of said company, against said Gist; and shall further find, that when said single bills became due, payment was demanded, and refused by said company, and that notice thereof was given to said Gist, on the days shown by the protests in evidence, in this cause. Of this instruction the appellants complain.

Upon what grounds is it asked of us to say, that the court below erred in giving this instruction? It was frequently assumed, in the course of the argument, that sealed instruments are the causes of action in this case, and authorities were cited to prove, that instruments of that description, if left blank, could not be filled up by the owner of them. But this action is grounded, not upon the promises of the Eutaw Company, which are to be found only in sealed instruments, but upon alleged written promises of the defendant, in the court below, to which there were no seals. Many of the cases, therefore, with a reference to which we have been furnished, afford us no information, with regard to the law of this case. Those alleged promises, although on the same piece of paper, may be collateral to or distinct from, and no part of the obligations of the Eutaw Company.

Much stress was, in the course of the argument, laid upon the circumstance, that the obligations of the Eutaw Company were not promissory notes or negotiable paper; and it seemed to be conceded, that if they had been instruments of that description, the defendant in error would have been entitled to recover; the

authorities, however, would not appear to lead us to this conclusion. Chancellor Kent says (3 Com., p. 59, 1st ed.), no other use can be made of a blank indorsement on a note or bill of exchange, in filling it up, than to point out the person to whom the bill or note is to be paid. In the case of *Moies v. Bird*, 11 Mass. 436 [6 Am. Dec. 179], Justice Parker, pronouncing the opinion of the court, said: "Had the note been made payable to him, and negotiable in its form, the plaintiff would have been restricted to such an engagement, written over the signature, as would conform to the nature of the instrument. In such case, the defendant would have been held as indorser, and in no other form, for such must be presumed to have been the intent of the parties to the instrument." But this note was not made payable to the defendant, and was, therefore, not negotiable by his indorsement. What then was the effect of his signature? It was to make him absolutely liable to pay the contents of the note. He puts his name upon a note, payable to another, in consequence of a purchase made by his brother, in a day or two after the bargain was made, knowing that he could not be considered in the light of a common indorser, and that he was entitled to none of the privileges of that character. He leaves it to the holder of the note, to write anything over his name which might be considered not to be inconsistent with the nature of the transaction. In *Seabury v. Hungerford*, 2 Hill (N. Y.), 80, the court say: "When a contract can not be enforced, in the particular mode contemplated by the parties, the court, rather than to suffer the agreement to fail altogether, will, if possible, give effect to it in some other way."

This is an attempt to charge the defendant with the amount due on two obligations; because of an indorsement thereon of his name in blank, and, of course, the obligation is not, speaking technically, a negotiable instrument. Justice Story, in his able work on the law of promissory notes, page 587, speaking of notes, with the name indorsed in blank thereon, says: "These cases have been either, first, where the note was not negotiable, or second, where it was negotiable," and then adds: "In the former class of cases, it has been held, that if the blank indorsement was made at the same time as the note itself, the indorser ought to be held liable as an original promisor or maker of the note, and that the payee is at liberty to write over the signature, 'For value received, I undertake to pay the money within mentioned to B.,' the payee."

It is not the duty of this court to say, upon how much less proof than was offered by him, the plaintiff, in the court below, might have recovered the amount of his claim. He might, perhaps, have regarded this as a contract, like that spoken of by the supreme court of the United States, in the case of *De Wolf v. Rabaud et al.*, 1 Pet. 476, "a trilateral contract, each as an original promise, though the one may be deemed subsidiary, or secondary to the other, a credit not given solely to either, but to both; not as joint contractors, on the same contract, but as separate contractors, upon co-existing contracts, forming parts of the same general transaction." It may be, that the plaintiff below, might have filled up the blank somewhat differently, and thereby, have dispensed with the necessity of offering some of the proof which he adduced, but it is not perceived, that the blanks are filled up, otherwise than as the holder of the notes was at liberty to fill them up, or that the defendants have any cause to complain of the insertion of any word, which, consistently with the nature of the transaction, might have been omitted. Indeed, in order to sustain this decision of the court below, it is not necessary to rely on very modern decisions. The principles settled by the case of *Russel v. Langstaffe*, 2 Doug. 514, and the various cases in the books (see *Gibson v. Hunter*, 2 H. Bl. 298, note), brought upon bills payable to a fictitious payee, or order, would seem to be sufficient for our purpose. If in cases like those now spoken of, such objections to a recovery were overruled, it is difficult to come to a conclusion, that they can be fatal objections to a recovery in this suit. In the first case (that in *Douglass*), the defendant indorsed several notes, all of them at the time blank, that is, without any sum, date, or time of payment, mentioned in the notes. The defendant's counsel, in the case, might well say, that by the signature, the defendant contracted for no given sum; that notes, without sum or date, were waste paper, and might insist, that the declaration, which alleged a pre-existing note, made previous to the indorsement, was at war with the facts of the case. Lord Mansfield however held, that it was a clear case, in favor of the plaintiff.

In the suits upon notes, or bills, payable to a fictitious payee, or order, it was strenuously argued, that the law merchant forbade notes payable to order, to be treated as notes payable to bearer. The court however, decided, that if the rules of law prevented the instrument from operating, according to the words used therein, it may be stated in such a manner, that the law will give effect to them. The intention of the parties is to

be considered, and effect is to be given to that intention, if no rule of law is thereby violated. In this case, we must not doubt, for the defendant below admitted to the witness, and the jury have, by their verdict, found, that the defendant in the court below agreed for a valuable consideration, to become, and by indorsing them, designed to become security for the money expressed in each instrument.

It appears by the bill of exceptions, that the jury were put in possession of acknowledgments by Gist (the defendant below), that he and Keener, were to raise money for the Eutaw Company; and of his further acknowledgments, that in consideration of his (Gist's) indorsing the bills, the company agreed to give him credit upon the claims, which it had against him (he being at the time, the debtor of the company); that he indorsed the bills in fulfillment of said agreement, and upon the bills so indorsed, money was raised. By the terms of the contract, then, between the company and Gist (for which the latter received a valuable and ample consideration), he was bound to become security for the payment of those bills of the Eutaw Company, and this, before any person was the owner of them; and moreover, that he was to become such security, by the indorsement of (or writing his name on) them. Surely upon such testimony (which the jury were to believe) the appellee was entitled *ex æquo et bono*, to demand of the defendant below, the amount of notes, the payment of which, to the holders of them, was to be secured by his indorsement, and the amount of which, was to remain in his own hands, in order to save him from any possible loss. The man who becomes a party to such a contract, for such a purpose, and for such a consideration, is forbidden, by everything like reason and justice, to deny, that the appellee became the owner of the bills at his special instance, and because of his undertaking to pay the holder of them their amount, if default was made by the makers of them. Surely, of such a transaction it may be said, as was said by Baron Hotham, in *Gibson v. Minot*, 1 H. Bl. 584, "unless some stubborn rule of law stand in the way of the present judgment, it ought to be supported."

Immediately following the prayer of the appellee, we read in the bill of exceptions, that "the defendant offered to the court the following prayers." These prayers (fourteen in number) are nearly all of them points, which might be legitimately insisted upon by the counsel, whose duty it was in the court below, or in this court, to argue, that the court ought not to give the instruction, of which we have already spoken. Upon a few of

them, some remarks will be made. The fifth was properly rejected. It required the court to assume, that the parties might not have known, that single bills were not such commercial, negotiable instruments as promissory notes, or might not know, what was the liability which the defendant below assumed, when he indorsed them. The law requires us to assume, that the parties did understand the contract into which they entered, and the liability which the defendant below assumed. It would have been improper to authorize the jury, to infer from the evidence the existence of such ignorance among the parties, and if so, to instruct them that if it existed, the verdict must be for the defendant. With respect to the thirteenth, and the next point (which may be considered in connection with it) they seem to assume, that if the Eutaw Company had no authority (to be found in its charter) to make those writings obligatory, then the defendant could not oblige himself, to pay to the holders of them, the sums of money expressed in either of them. It is thought, that it did not lie in the mouth of the defendant below, to make such an objection. He was capable of binding himself to pay the debts, if when they became due, they remained unpaid.

In regard to the supposed speculation in cotton, the testimony (derived from the defendant below), was, that the cotton purchased, was "for packing their machinery." By this, it can only be understood, that it was purchased to pack, in order to send away, the articles in which the company was authorized by its charter to deal. For such a purpose, the company was surely authorized to buy cotton upon credit as well as for cash, and might give its bonds as well as the verbal promise of any of its members, or its officers, for payment of the purchase money. For reasons which have already been suggested, we think there is no error in the refusal by the court to give the other instructions, which were not given.

There is another exception taken by the plaintiff in error, of which we will now dispose. A rule of Baltimore county court, then existing, commenced in these words: "The court will require in all cases, that the whole testimony intended to be produced by both plaintiff and defendant, shall be offered before any question of law is raised, except objections to the competency of testimony." In this case, after all the points submitted by the defendant, as well as plaintiff, had been decided by the court, the defendant offered to introduce other testimony. The plaintiff objected to its introduction, "at this stage of the cause," relying on the rule of court above mentioned, and the

court "refused to permit the testimony, under the circumstances stated, to go to the jury." Was there error in this refusal, for which an appellate court ought to reverse the judgment of the court below?

This court has heretofore (*Wall v. Wall*, 2 Har. & G. 82) said, "there exists no discretion in an inferior court, to dispense, at pleasure, with their own rules, or to innovate upon established practice; and a party injured by such a course, has an undoubted right to seek redress in this court. Every suitor is interested in the interpretation of the rules of court applicable to his case; and an erroneous judgment of the county court in relation to them, may in many cases be as vitally injurious to him as a wrongful judgment upon the law which may govern his case." Again, in the case of *Dunbar v. Conway*, 11 Gill & J. 97, "this court has always regarded a legitimate rule of a court as prescribing a law to the court. The proper office of such a rule, is to establish fixed and settled practice, to which the court is required to conform, and any error of opinion, in respect to its legal effect, or to its application to a particular case, will entitle the party injured to redress by appeal." It is believed, that the power of this court, in acting upon appeals of this description, as well as the duties of the court below, in regard to the observance of its own rules, are accurately defined in the above extracts, from its former decisions; and that a plaintiff in error, who brings such a complaint as this before us, must show that he is authorized by these former opinions of the court to prefer such a complaint against the court below. Rules of court, adopted for the dispatch of business, and the impartial administration of justice, must be written, so that all may understand them, and when adopted, must be a law to the court, as well as to others. But it can never be a question in this court, whether a rule adopted by any inferior court is just such a rule as in the opinion of this court, or a majority of its members, ought to be adopted in preference to any other rule, calculated and designed to accomplish the same object.

It can not be alleged, that in this case the court dispensed with its rule, or changed its practice. The question then must be, had the court power to make such a rule, and because of its existence, deprive the defendant of an opportunity of introducing testimony, at a time, when according to the rule, it was inadmissible? It appears by the record, that the defendant below had not previously offered any testimony. This, however, is unimportant, as it must be taken for granted, that he had de-

clined to offer any, at the time when the rule of court required or permitted it to be offered. The testimony offered, if it had proved the fact for which it was offered, might have rendered wholly unnecessary a discussion of the very many points of law, upon which the defendant below seemed to the court to be disposed to rest his case. Why this testimony was not offered at an earlier stage of the trial, is not shown. We can not, therefore, assume, that at the time when he ought to have submitted it, according to the rule of court, it was out of his reach, or was afterwards discovered. A court constituted as this is, would necessarily feel reluctant to entertain the question, what rules would be the best for, and therefore ought to be adopted by, the courts of any one of our judicial districts? How long the parties shall be at liberty to introduce fresh testimony, or at what stage of the trial this privilege shall cease, it is proper that a rule of court should determine; and yet, it is not to be believed, that any rule for that purpose, which can be devised, would be equally proper for every district.

There may be reasons, oftentimes, why either party, and especially the defendant, should be permitted to settle the law of the case, before he consumes the time of the court, in examining witnesses, whose testimony may afterwards be found to be wholly unnecessary. But, who is to be the judge of this, in any particular case? Certainly not the party himself. He may suggest this course, with his reasons for preferring it, and if the court and his adversary approve of it, none would say, that the observance of the rule might not be dispensed with. But ought such a course to be pursued, if the court, when the reasons for preferring it are made known, thinks that the rule ought to be adhered to?

It is very much in favor of the rule under consideration, that it was adopted as a rule for city business, at least fifteen years ago, and yet, that it is now for the first time, it is believed, a subject of complaint in this court.

Judgment affirmed.

INDORSEMENT OF A SEALED INSTRUMENT CREATES NO LIABILITY, unless there is a special contract from which it arises: *Jackson v. Myers*, 43 Md. 462, citing the principal case. To the same effect, see *Prevall v. Fish*, 34 Am. Dec. 558, and cases cited in note.

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HENDERSON v. MAYHEW. MAYHEW v. HENDERSON.

[2 GILL, 293.]

CREDIT GIVEN TO AN AGENT DOES NOT EXONERATE THE PRINCIPAL, if at the time that the credit was given, the agency was unknown to him who gave it.

PAROL EVIDENCE IS INADMISSIBLE TO CONTRADIOT THE TERMS OF A WRITTEN INSTRUMENT, in behalf of one of the parties thereto, in a controversy between himself and a stranger to the instrument. Thus, if charged with the ownership of a vessel, he can not show that the absolute bill of sale executed to him was intended as a mortgage.

ASSUMPSIT. Henderson was the plaintiff below. The action was upon an account for supplies furnished by him to the brig Harriet, at the request of her master, Captain Champion. It was contended by plaintiff that defendants were the owners of the brig when the supplies were furnished. In support of this position they introduced in evidence a bill of sale, absolute upon its face, executed to them by Boyle, the former owner of the brig, and also an application for a registry of the vessel, sworn to by defendants, in which they described themselves as owners thereof. Defendants insisted that this bill of sale was intended as a mortgage, and was given to secure them against an advance that they had made to Boyle. They further introduced evidence to the effect, that before the supplies were furnished, Boyle had chartered the vessel to one Hall for a voyage to the coast of Africa, and that the supplies were for the repair and furnishing the vessel, as provided by the charter party. There was some evidence, however, tending to show that Boyle acted in this matter as the agent of defendants. The bill for the supplies was presented to Boyle, but at the time the plaintiff did not know of the bill of sale to defendants. Both parties appealed to this court. The other facts appear in the opinion.

Teackle and Steele, for the plaintiffs below.

Hinckley, contra.

By Court, MAGRUDER, J. This action was brought by the appellants, to recover from the appellee a sum of money alleged to be due, for supplies furnished for the brig Harriet, by the appellants. It is not disputed that the supplies were furnished, but it is insisted by the appellees, that they are not responsible for them: 1. Because they were not the owners of the vessel; 2. Because the credit was given to another, to wit, to Hugh Boyle.

There was certainly evidence offered to the jury, that the appellees were the owners of the vessel at the time that she was

furnished with the supplies. But the account against the vessel and its owner, was sent to Boyle, and this it is supposed, was giving credit to him. It appears, however, that Boyle was at one time the owner of the vessel, and it would seem that the account was sent to him, under an impression that he was still the owner. This proof of the account being sent to Boyle, can not discharge the owner, if, but for this proof, he would have been answerable. Unless the seller knows at the time who the principal is, and notwithstanding that knowledge, makes the agent his debtor, the principal is not discharged: See Roscoe on Evidence, 216, and the authorities there collected. Notwithstanding all the testimony, then, on the part of the appellees, designed to show that the credit was given to Boyle, the former may be answerable, and it is a material question in the case, whether Boyle, in purchasing these supplies, is not to be regarded as the agent of the appellees? There was testimony offered to the jury, "tending to prove" the agency. Of the weight to which that testimony was entitled, the jury are the exclusive judges. The court below, therefore, erred in granting the second prayer of the defendants below, as it withdrew the question of agency from the consideration of the jury, and also in giving the instruction which was given, in lieu of the instruction asked for by the appellees in their third prayer. No error is discovered in the rejection of the appellant's first or third prayer.

The appellants, who were defendants in the court below, took exception to the opinion of the court, that parol evidence was inadmissible to show, that the bill of sale was intended to be a mortgage. It is the opinion of this court that the decision was correct. Parol evidence is inadmissible to change or contradict the terms of a written instrument. Strangers to the instrument, when authorized to impeach or contradict it, may offer parol testimony for that purpose; and so a grantor may, in a controversy with the grantee, if he charges the same to have been obtained by fraud or mistake. But the parties to a written instrument are not permitted, in controversies with strangers, to insist, that it does not express what it was intended to express. The appellants, after obtaining an absolute deed, and authorizing the community to regard them as the owners of the vessel, can not now, for their own benefit, be permitted to allege that their bill of sale is a mortgage. The party here, who is a stranger to the deed, insists, that it is what it purports to be, and the appellants, who accepted it, are precluded from offering the evidence on which they rely, in order to defeat the action against

them. Judgment must therefore be reversed upon the appeal of the plaintiffs below, upon this second prayer; and upon the instructions given by the court to the jury. And affirmed upon their first and third prayers.

Upon the appeal of the defendants below, the instructions to which they excepted are affirmed.

DORSEY, J., dissented to the affirmance, upon the appeal of the defendants below.

Judgment reversed upon the appeal of J. and G. Henderson, and *procedendo* awarded.

AN UNDISCLOSED PRINCIPAL MAY, WHEN DISCOVERED, BE SUED by the person who has sold goods to his agent, or the latter may be at the creditor's option: *Mayhew v. Graham*, 4 Gill, 363, citing principal case. To the same effect: *Smith v. Plummer*, 34 Am. Dec. 530.

IF THERE BE ANY EVIDENCE OF A FACT, it can not be withdrawn from the consideration of the jury; nor can any court assume any degree of evidence to be sufficient, but it must be submitted to the jury: *York Co. Bk. of Pa. v. Stein*, 24 Md. 466; *National Mechanics' Bk. of Balt. v. National Bk. of Balt.*, 36 Id. 23; *Cumberland Coal etc. Co. v. Scully*, 27 Id. 602.

A WRITTEN INSTRUMENT CAN NOT BE CONTRADICTED by a party thereto, in a controversy between himself and a stranger: *Alderson v. Ames*, 6 Md. 57; but the stranger thereto may contradict: *Grove v. Reusch*, 26 Id. 378.

HARLAN v. BROWN.

[3 GILL, 475.]

POWER OF SALE IN AN EXECUTOR, TO BE EXECUTED WITHIN A GIVEN TIME, does not necessitate the execution of a deed within that period, if the sale itself has been within it; and parol evidence is admissible to show that a deed dated after the expiration of the period is in consummation of a sale made within the period.

ALLOWANCE TO BE MADE FOR THE VARIATION OF THE COMPASS, and whether any allowance should be made to determine the location of a survey, are questions of fact for the determination of the jury.

APPEALS from Cecil county. The appeals were in two actions, one of ejectment by the lessees of Harlan against Brown, the other in an action of trespass *quare clausum fregit* by Brown against Harlan. The opinion states the facts of the case.

Grooms and McLean, for the appellants.

Otho Scott, and Constable, contra.

By Court, MARTIN, J. The cases of John H. Harlan and Margaret A. Harlan against David Brown, and John H. Harlan and

Margaret A. Harlan's lessees against David Brown, were presented together. The first case is an action of trespass, *quare clausum fregit*, the other an ejectment. John H. Harlan and wife were the plaintiffs below in the action of ejectment, and the defendants in the action of trespass. At the trial of the trespass case, three exceptions were taken by the defendants to the opinions of the court. Three exceptions precisely similar, were taken by the same parties, as plaintiffs in the action of ejectment, and also an additional exception. We propose to examine these exceptions in the order in which they have been presented.

By the second item of the will of John Dickson, it is provided, that the residue of the real and personal estate of the testator, be sold by his executor within two years from his decease. David Brown claimed under the deed executed by the executor of John Dickson, in conformity with the power conferred on him by the will. It became therefore important for him to prove, that the sale was made within two years from the death of the testator, both, for the purpose of showing that the authority conferred on the executor had been properly exercised, and that the sale in question was not embraced by the tenth section of the act of assembly of 1831, c. 315. And it certainly was competent to the party, to establish by parol evidence, as the legal and appropriate mode, the time at which this sale was made. This forms the subject of the first exception, and we think the court were right in admitting the evidence.

Testimony having been received to show, that the sale of the property in dispute had been made by Samuel Rowland to David Brown, within two years from the death of Dickson, the court were asked to instruct the jury, that the deed of Rowland to Brown and Henshaw, was no evidence of title, unless they should further find that it was executed within two years from the death of Dickson. This instruction the court refused to grant, and presents the question raised by the second exception. We concur with the court below, in the opinion expressed by them in this exception, for the plain reason, that the validity of the deed from the executor to the parties claiming under it, depends not on the time when the deed was executed, but when the sale was made; and evidence had been offered, to establish the *factum* of the sale within the period prescribed by the will. The power of sale conferred on the executor, was, we hold, properly executed by a sale of the property within two years from the death of the testator, although the deed was not executed by him, until after

that period had elapsed. We concur also, with the opinion expressed by the county court in the third exception. There was no law making the validity of the sale by Samuel Rowland, as the executor of Dickson, depend on its confirmation by the orphans' court of Cecil county, as supposed by the defendants' prayer. It was not embraced by the act of assembly of 1831, c. 315, sec. 10, because the sale was made before that statute went into operation. It follows from the views thus expressed, that in the case of John H. Harlan and Margaret A. Harlan against David Brown, the judgment must be affirmed.

The only remaining question to be examined, is that presented by the fourth exception, in the case of Harlan's lessees against David Brown. It has already been stated, that the three first exceptions in this case are similar to that raised in the trespass case, between the same parties. We, of course, concur with the county court in the opinions expressed by them in those exceptions. But we dissent from the instruction given to the jury, as contained in the fourth exception. The question involved depended entirely on the true location of the second line of the tract of land called "Dividing." This court, as early as the case of *Howard v. Cromwell*, 1 Har. & J. 118, in affirming the opinion of the general court, decided, "that it is the province of the jury to determine the true location of the lands in controversy, from the evidence adduced by the parties, and that it is for the jury to decide, on the justice and propriety of allowing, or not allowing the variation of the compass, and the rate or rule of such allowance, according to the evidence in the cause." And in *Hughes v. Howard*, 3 Id. 12, the court of appeals say: "It is the acknowledged and exclusive province of the jury, to decide on the variation of the compass, and to make such allowance as corresponds with the proof, and will advance justice. The juries, in fixing the variation of the compass, are not confined to any certain rules, but are governed by the circumstances existing in the case. The juries, in some cases, have refused to make any allowance, in others they have allowed at the rate of one degree for every twenty years, and in others they have been influenced by ancient runnings and proof of possessions."

What then is the character of the instruction which the court were desired to give in the fourth exception? They were asked to direct the jury, "that if they believed that the boundary, at the end of the first line of 'Dividing,' was at the place the defendant had located the same, and that the division

fences, between the former and present owners of the land called 'Dividing,' and the land called 'Steele's,' and the other adjacent lands, were on the second line of 'Dividing,' as located by the defendants; and should further believe, that in former runnings of said line, in the life-time of Stephen Porter, it ran where the defendants now have located it; that then, such facts were better evidence for the jury, to determine what allowance should be made, to correct the variation of the needle in running said line of 'Dividing,' than the theory of allowing one degree for every twenty years." This instruction the court below gave, and in doing so, invaded, we think, the province of the jury.

It is for the court to decide on the admissibility of evidence; but the comparative value, or weight of testimony, is a question for the consideration of the jury, and it was for that tribunal, and not the court, to determine, whether the facts relied on by the defendants, were better evidence to guide them, in correcting the variation of the compass, than the rule sometimes adopted, of allowing one degree for every twenty years. The doctrine announced by the court of appeals, in the cases referred to, is, that whether any allowance is to be made for the variation of the compass, and if so, the rule or law by which that allowance is to be ascertained, is a question of fact for the determination of the jury, upon all the circumstances of the case. The judgment of the county court, in the case of John H. Harlan and Margaret A. Harlan's lessees against David Brown, is therefore reversed, and a *procedendo* awarded.

Judgment affirmed in one case, and reversed, with a *procedendo* in the other.

HARDESTY v. WILSON.

[2 GILL, 481.]

INDULGENCE GIVEN TO PURCHASER AT AN EXECUTION SALE BY THE SHERIFF is not binding upon the plaintiff in execution, and does not affect him with any responsibility to his judgment debtor.

BID AT AN EXECUTION SALE, if not paid within a reasonable time, may be disregarded and a resale of the property had. The bidder acquires no property before he has paid his bid.

BID AT AN EXECUTION SALE does not discharge the debt or any portion thereof before payment.

BILL for an injunction. Complainant, John Hardesty, purchased a tract of land called Sandy Point from defendant, and

gave his note, with Matthew Hardesty, the other complainant, as surety thereon, for the unpaid purchase money. Judgment was subsequently obtained by defendant upon this note, and execution thereon he caused to be levied upon the Sandy Point tract of land, and also upon other property of defendants. It was now alleged by complainants, that before any change of possession under the contract of sale referred to had been made, the parties thereto and one Hall agreed that the latter should be substituted as purchaser in the place of Hardesty, and that this agreement had been followed by a surrender of possession to said Hall. It was further alleged by them that at the sale under the *fiery facias* issued on the judgment obtained against them, the Sandy Point tract of land had been sold for an amount sufficient to discharge the larger portion of the debt, and that the remaining balance had since been paid by them to A. Randall, defendant's attorney. Complainants further stated that, notwithstanding these matters, defendant had again caused their property levied upon under the writ of *fiery facias*, alike the Sandy Point tract and the other property, to be advertised for sale, for the alleged reason that the purchaser's bid at the sale had not been paid. Complainants insisted that the reason for this was that defendant had given to said purchaser time for payment, and that, at the expiration of the time, he himself failed to meet said purchaser at the place agreed upon to receive from him the purchase money. Complainants prayed for an injunction against the sale of any of the property levied upon under the writ of *fiery facias*, or at least against a sale of anything more than the Sandy Point tract. The answer denies the agreement that Hall should be substituted as purchaser, or that any extension of time for payment had been given by defendant to the purchaser at execution sale; and alleged that though such indulgence had been given to said purchaser by the sheriff who made the sale, it was without defendant's privity or consent. Upon the filing of this answer an interlocutory injunction, which had been granted in this matter, was dissolved. Complainant appealed.

Murray and Steele, for the appellants.

Wells and Alexander, contra.

By Court, MAGRUDER, J. Everything in the bill of complaint, which may be considered as constituting the equity of the complainant's case, seems to have been satisfactorily answered. If it was improper for the sheriff, to give the indulgence which he

gave to the purchaser, it was given not at the instance, or with the consent of the plaintiff at law. In this suit, to which the sheriff is no party, we can not inquire into the conduct of that officer. The law of the case, *Scott v. Bruce*, 2 Har. & G. 262, can not be questioned.

As to the alleged payment to Mr. Randall, it can entitle the complainant only to a credit for so much as Randall, acting for the plaintiff's attorney, received. It does not follow, that because a bidder is found, and he makes the highest bid, that the supposed sale to him, discharges so much of the debt. The highest bidder acquires no title to the thing purchased, but by payment of the purchase money, and if he fail to do this within a reasonable time, a resale may lawfully be made. We discover nothing in this case, which entitles the complainant to relief in equity. With respect to the point, for which most of the authorities were cited by the solicitors of the complainants, this court decided otherwise, in the case of *Sasscer v. Walker's Ex'rs*, 5 Gill & J. 102 [25 Am. Dec. 272]. But surely, it would not follow, that a sale of the property on which the first levy is made, can be hindered by the defendant at law. If, as it is supposed, the seizure is a satisfaction of the debt, the defendant would no longer have any interest in it, and could not complain that a sale of it was about to be made. The order of the chancellor, so far as it overrules exceptions filed to the answer, can not be before us at this time.

So much of the order as dissolves the injunction, is affirmed; appeal from the rest is dismissed.

Order affirmed as to injunction.

A PURCHASER AT EXECUTION SALE must pay his bid at once, or it may be disregarded and the property resold: *Dunford v. Degruys*, 13 Am. Dec. 235, and note, in which the principal case is referred to on that proposition.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

BRACKETT v. BLAKE.

[7 METCALF, 335.]

VALID ASSIGNMENT OF QUARTER'S SALARY BEFORE EXPIRATION OF QUARTER
can be made by a municipal officer appointed for a year, but removable
at the will of the appointing power.

TRUSTEE process. The city of Boston was summoned as trustee of the defendant Blake, in respect of moneys claimed to be due the defendant on his salary as city marshal, for the quarter ending January 1, 1842. The facts were, as appeared from the trustee's answer, that the defendant on October 6, 1841, assigned to one Toppan his salary for the current quarter, for a valuable consideration. The question was as to the validity of the assignment. It appeared by the ordinances of the city that the marshal was appointed annually, but was removable at the will of the mayor and aldermen.

Putnam, for the plaintiff.

E. G. Austin, city attorney, for the trustee.

By Court, SHAW, C. J. The quarter's salary of the city marshal, which was to become due on the first of January, 1842, was a possibility coupled with an interest, and, as such, capable of being assigned. He is chosen for a year; and the fact that he was liable to be removed at the will of the mayor and aldermen, merely made the contract defeasible. But a defeasible or voidable contract in force is a good ground upon which an interest may be raised, until defeated. A tenant at will has an interest in the soil and its produce, until the determination of

the tenancy by one of the parties. One who holds land by grant, on a condition subsequent, has a full dominion over the land, and its rents and issues, until the happening of the condition. In the case decided by Williams, C. J., it was merely held that an attachment of a schoolmaster's salary would not hold, if made before a quarter's salary was due; because, at the time of the attachment it was not due, and of course there was no credit to be attached, even if the contract for a year's service was not entire and indivisible, as the judge was inclined to think it. The validity of the assignment, in that case, was not in question, because the assignment was made after the attachment.

Trustee discharged.

ASSIGNMENT OF DEBT TO BECOME DUE ON THE COMPLETION of a work or term of service, is valid as against a subsequent garnishment: *Payne v. Mayor etc. of Mobile*, 37 Am. Dec. 744. That an officer's salary to become due, is a possibility coupled with an interest, and therefore assignable, is held, citing the principal case, in *State Bank v. Hastings*, 15 Wis. 75. So wages due, and to become due, under a contract of service for a specified time, are assignable: *Emery v. Lawrence*, 8 Cush. 154. Otherwise, if there is no contract for the services existing at the time of the assignment: *Mulhall v. Quinn*, 1 Gray, 108.

It was held, however, in *Bliss v. Lawrence*, 58 N. Y. 442, that, although a public officer may have an assignable interest in his salary not yet due, he can not make a valid assignment of it in advance, because public policy forbids such transactions. In that case, an assignment by a United States treasury official of a month's salary, in advance, at a discount of ten per cent., was on this ground declared invalid. Johnson, J., who delivered the opinion, reviewed a large number of English cases, illustrating and enforcing the general principle of public policy upon which the decision was based; *Flarty v. Odham*, 3 T. R. 681; *Lidderdale v. Montrose*, 4 Id. 248; *Stone v. Lidderdale*, 2 Anst. 233; *Barwick v. Read*, 1 H. Bl. 627; *Arbuckle v. Cowhan*, 3 Bos. & Pul. 328; *Wells v. Foster*, 8 Mee. 149; *Palmer v. Bate*, 2 Brod. & B. 673; *Davis v. Marlborough*, 1 Swans. 79; *Hill v. Paul*, 8 Cl. & Fin. 307; *Liverpool v. Wright*, 28 L. J. Ch. 871; *Arbuthnot v. Norton*, 5 Moo. P. C. 230. He also cited Story's Eq. Jur., sec. 1040 d, and 1 Pars. on Con. 194. In the course of his opinion, also, he reviewed a number of Massachusetts cases, including *Brackett v. Blake*, in which assignments of salary to become due were supported, and showed that they did not touch the question of the invalidity of such assignments, on grounds of public policy, but that the decisions were confined to the question of assignable interest in salary not yet fully earned. On this point he said: "In respect to American authority, we have been referred to *Brackett v. Blake*, 7 Metc. 335; *Mulhall v. Quinn*, 1 Gray, 105; and *Macomber v. Doane*, 2 Allen, 541, as conflicting with the views we have expressed. An examination of these cases shows that the point of public policy was not considered by the court in either of them, but that the question was regarded as entirely relating to the sufficiency of the interest of the assignor in the future salary to distinguish the cases from those of attempted assignments of mere expectations, such as those of an expectant heir. The court held that in the cases cited, the expectation of future salary being founded on existing engagements, was capable of assignment, and that the

existing interest sufficed to support the transfer of the future expectation." His honor also criticised *State Bank v. Hastings*, 15 Wis. 75, in which it was said that the doctrine of the English cases on this subject was not applicable to the condition of affairs in this country, and that there could be no reasonable objection, on the ground of public policy, to an assignment by a judge of his salary for a quarter or other current period not yet expired, if the assignee was willing to take the risk of the assignor's living until the salary was fully earned. Mr. Justice Johnson, however, thought that the English decisions were based upon a principle which was just as applicable in America as in England.

APPORTIONMENT OF SALARY PAYABLE QUARTERLY OR THE LIKE.—In *Hadley v. Peabody*, 13 Gray, 200, it is held, citing the principal case, that a contract of a school teacher to serve for a salary payable quarterly was entire, and that the salary could not be apportioned for part of a quarter, and, therefore, that where process of garnishment was served in the middle of the quarter in an action against such teacher, it did not bind a proportionate part of the salary up to the time of service. As to apportionment of rents, annuities, salary, or the like, see *Wiggin v. Sweet*, 39 Am. Dec. 716, and other cases collected in the note thereto.

OFFICER OF MUNICIPAL CORPORATION REMOVABLE at pleasure is removed by the repeal of the ordinance creating the office, and notice to him of such repeal: *Chandler v. Lawrence*, 128 Mass. 215, citing the principal case.

MINOT v. THACHER. MINOT v. MANUFACTURERS' INS. CO. MINOT v. CARTWRIGHT.

[7 METCALF, 348.]

STATUTE OF LIMITATIONS DOES NOT PREVENT PROOF OF CLAIM AGAINST INSOLVENT'S ESTATE under the insolvent laws where the claim was not barred when the notice of proceedings in insolvency was first published, though the statutory period has run before the claim is proved.

DISCHARGE UNDER UNITED STATES BANKRUPT ACT OF 1841 LEAVES INDEPENDENT SECURITIES or other means of payment, held by a creditor of the bankrupt, unimpaired, though it releases the debtor from all further personal liability.

PROCEEDINGS UNDER STATE INSOLVENT LAW INSTITUTED BEFORE ENACTMENT OF BANKRUPT LAW OF 1841 are not superseded by an application of the insolvent for a discharge under the bankrupt act, and such discharge does not affect the right of creditors, existing at the date of his assignment under the insolvent law, to prove their claims against his estate in the insolvency proceedings.

CLAIMS AGAINST INSOLVENT'S ESTATE MAY BE PROVED AT FIFTH MEETING of creditors under the Massachusetts insolvent law of 1838, but only so as to affect funds remaining unappropriated in the assignee's hands.

APPEALS from the decision of a master in chancery allowing certain claims of Thacher and others, the Manufacturers' Insurance Company and one Cartwright, to be proved against the estate of one Rogerson, an insolvent debtor, of which the appellants, Minot

and others, were assignees, under the statutes of 1838, c. 163. The notice of the issuance of the warrant to take possession of the insolvent's property was published December 5, 1839. The statute of limitations had not at that time run against any of the claims. The insolvent was discharged under the act at the second meeting of creditors, held December 30, 1869. None of the claims now in controversy were proved until the fifth meeting of creditors, December 12, 1842, at which date the statutory period of six years had run against the claim of the insurance company. The United States bankrupt act of 1841 was passed August 19, 1841. On February 3, 1842, the insolvent petitioned to be declared a bankrupt under that act, and was declared a bankrupt March 22, 1842, and received his discharge July 30, 1842. The grounds on which the master's allowance of the claims was resisted appear from the opinion.

Brigham, for the appellants.

W. Gray and Dehon, for the appellees.

By Court, *Dewey, J.* The first objection to the allowance of the claims of the appellees is, that the same were barred by the statute of limitations. The position assumed by the assignees is, that though six years had not elapsed since the cause of action accrued, computing the time with reference to the publication of the proceedings in insolvency and the appointment of the messenger to take possession of the goods and effects of the insolvent; yet as it had elapsed before the time of the meeting of the creditors, at which the demands were presented, it is a good statute bar to these demands. It seems necessary only to state the proposition, to show that it can not be sustained. By force and effect of the appointment of a messenger, and the publication thereof conformably to the statute, the property of the insolvent debtor is sequestered for the benefit of all the then existing creditors. After such publication, a suit by a creditor would be of no avail, as the property is all transferred to an assignee, and the body of the debtor is to be discharged from arrest on execution. The debts presented for allowance against the insolvent are to be considered with reference to their validity at the date of the publication by the messenger. If they are found to be barred by the statute of limitations at that period, it would of course be competent for the assignees to object to their allowance, but not to compute the six years with reference to the time of the meeting of the creditors. A different rule would do manifest injustice. Take the case of a creditor, who has a debt

which will be barred in thirty days. He knows that by law he has until the last of those thirty days to institute his suit, and intends to do so; but in this state of things, the debtor, upon his voluntary application, goes into insolvency under the statute of 1838, c. 163; the incipient proceedings are all regularly taken; but no meeting of the creditors is held for proving their debts, until thirty days have elapsed. Is the debt of this creditor to be rejected, as barred by the statute of limitations? Clearly not. But the principle contended for by the assignees would lead to that result, in the case supposed.

The true rule is doubtless that already suggested, namely, to compute the six years with reference to the time of publication of the notice of proceedings in insolvency. A similar principle is adopted in cases in bankruptcy: *Ex parte Ross*, 2 Glyn & Jameson, 46, 330. The motion there was to reject certain demands presented for allowance by reason of the statute bar of six years' limitation. The vice-chancellor said, that "after a commission issued, the statute of limitations does not run against a creditor; that the commission was a trust for the benefit of all the creditors, and it was a known principle that the statute did not run against a trust." On appeal to the lord chancellor, he asserted the same doctrine. The case of *Ex parte Dewdney*, 15 Ves. 479, was cited at the hearing before the vice-chancellor, but was not considered as an authority for the contrary doctrine. That case, as I understand it, was one where the demand had been barred by the statute of limitations, before the institution of any proceedings.

The second objection taken, and one applicable to all the claims, is, that they ought to be rejected, because the debtor had, at a date prior to the presentation of these claims to the master in chancery for allowance, been declared a bankrupt under the bankrupt law of the United States, and had in fact received his certificate of discharge. The petition to be declared a bankrupt, the decree thereon, and the discharge, were all long subsequent to the institution of the proceedings in insolvency, under the statute of 1838, c. 163, but prior to the time of filing the claims which are now the subject of controversy. The assignees contend, that the discharge under the bankrupt law operated, to all purposes, as a full discharge of the debtor from all his debts, and particularly from debts like the present; they having accrued prior to the statute of 1838, c. 163. It is true that the discharge in bankruptcy releases the debtor from all further personal liability for the payment of his debts. But it leaves

unimpaired all independent securities or other means held by the creditor, from which the debt may be realized. Prior to these proceedings in bankruptcy, the debtor, by his voluntary application as an insolvent, had caused all his property to be sequestered for the payment of his debts *pro rata*; and these creditors, by virtue of those proceedings, had acquired a right to claim their proportional dividend to be paid from the assets of the debtor in the hands of his assignees, on filing and proving their debts according to the provisions of the statute. The distribution of the estate of the insolvent is to be made among all who are creditors at the time of the publication of the insolvency by the messenger. The right to such distribution attaches, in reference to the state of the demand and the relation of debtor and creditor at that period. The proceedings under the insolvent law having been instituted before the bankrupt act was enacted, they could not be superseded by the application, under the bankrupt law, for the insolvent's discharge as a bankrupt. All the rights of the creditors as to the assets of the insolvent, which had accrued to them by virtue of the insolvent law, were continued to them notwithstanding the discharge of the debtor under the bankrupt act.

The third objection taken to the allowance of these demands by the master in chancery is, that it was not competent to present and prove claims as creditors of an insolvent debtor, at a fifth meeting of the creditors. The first, second, and third meetings of the creditors are undoubtedly more specially designed for the purpose of affording an opportunity to prove debts against the insolvent: Statutes 1838, c. 163, secs. 2, 7, 12; but provision is made in this statute for a fourth, and subsequent meetings, whenever the state of the assets requires and authorizes it; and it is expressly provided by section 13, that "at any regular meeting of the creditors, those who have not before proved their debts shall be allowed to prove the same;" confining the distribution among such creditors to the funds remaining unappropriated in the hands of the assignees.

All the exceptions taken to the allowance by the master in chancery are overruled, and his report, allowing the demands of the appellees, is confirmed.

PASSAGE OF UNITED STATES BANKRUPT ACT, EFFECT OF ON STATE INSOLVENT LAWS and proceedings thereunder: See the note to *Norton v. Cook*, 23 Am. Dec. 353, where this subject is considered. In *Parker v. Sanborn*, 7 Gray, 194, the principal case is cited to the point, that after the property of an insolvent has been assigned under the insolvent laws, and thus sequestered and placed in the custody of the law in trust for his creditors, the statute of

limitations does not run against their claims upon his estate in the hands of his assignees. So in *In re Eldridge & Co.*, 12 Nat. Bank. Reg. 542, 543, it is cited as authority for the position that proceedings in bankruptcy stop the running of the statute of limitations.

But insolvency proceedings do not hinder the running of the statute as against any right of action against the debtor: *Colleston v. Hailey*, 6 Gray, 519. In that case Shaw, C. J., took occasion to correct a misapprehension as to the effect of the decision in the principal case on this point. In the course of his opinion he thus commented on an objection that the statute was absolutely suspended by the publication of the notice: "This objection seems to have been founded on a misunderstanding or misapprehension of the authority of *Minot v. Thacher*, 7 Metc. 352. There the question was, as to the right of a creditor to prove a debt under proceedings in insolvency, where six years had not elapsed at the time of the first publication, but had passed when the debt was offered for proof. It is placed expressly on the ground, that, at the time of the first publication, the assets of the insolvent were sequestered and placed in the custody of the law, in trust for those who were then creditors, who then had provable debts. Of course the further lapse of time could not defeat the right thus vested, to prove a share equally with other creditors in this trust fund. But this has no bearing upon the question of the pleading of the statute of limitations to an action, which is wholly independent of the proceedings in insolvency. Such proceedings do not prevent a creditor from bringing an action, if he chooses so to do. He does it certainly at the peril of costs, if the discharge is seasonably obtained and pleaded in bar, so that there is not much temptation to do it. But there is nothing in law to prohibit it. Against such an action, therefore, the statute continues to run as if no insolvency had intervened."

DAVISON v. JOHONNOT.

[7 METCALF, 368.]

SPECIAL STATUTE AUTHORIZING GUARDIAN OF INSANE PERSON TO SELL CERTAIN REALTY of his ward, and to apply the proceeds to the discharge of incumbrances on other realty, is constitutional and valid.

APPOINTMENT OF GUARDIAN OF INSANE PERSON is not invalidated by want of notice to the alleged insane person of the time when the decree should be entered, where there is no other irregularity, the party having had due notice of the proceedings before inquisition, and having appeared and been fully heard on the application to declare him *non compos mentis*.

Writ of entry to recover certain lands. It appeared that the title was in the demandant, unless the same was divested by a sale and conveyance made by one Spear, as guardian for the demandant, who was adjudged *non compos mentis* by the probate court, in June, 1834. The sale was made pursuant to a resolve of the Massachusetts legislature, passed April 16, 1836, on the application of the said guardian, authorizing him to sell the realty in question, and to appropriate the proceeds to the payment of certain incumbrances on other realty of the said

Davison, and requiring the said guardian first to give bond for such appropriation of the proceeds, and to appropriate the residue for the ward's benefit, and to account for the same according to law. The sale was made accordingly, and the ancestor of the tenants, through whom they claimed, became the purchaser. The purchase money was appropriated and accounted for, as directed by the resolve. The demandant claimed that the resolve in question was unconstitutional and void, and that the sale thereunder was therefore invalid, and passed no title. He also claimed that the decree adjudging him *non compos mentis* and appointing a guardian for him, was invalid, because no notice was given him of the time when the decree would be entered. It appeared, however, that he had due notice to appear on a day named, before the mayor and aldermen of Boston, who were directed by warrant issued from the probate court to inquire into his sanity, and to show cause why he should not be adjudged *non compos mentis*; that he did not appear, but that after hearing he was on said day adjudged *non compos mentis*; that the inquisition having been returned to the probate court, he was duly notified to appear before that court on December 9, 1838, and show cause why he should not be adjudged *non compos mentis*, and have a guardian appointed for him; that he appeared accordingly, and the matter was fully heard, and after continuances from time to time, the decree adjudging him insane and appointing a guardian for him was entered June 16, 1834, as aforesaid. The case was taken from the jury and submitted to the court upon these facts, and others not necessary to be stated.

H. H. Fuller, for the demandant.

D. A. Simmons, for the tenants.

By Court, DEWEY, J. It will at once be perceived, that the present is a very grave question, in which we are called upon to review the proceedings of a co-ordinate branch of the government, and to decide whether the legislature in passing the resolve authorizing the sale of the estate of Andrew C. Davison by his guardian, transcended the limits of its constitutional powers. Every presumption is to be made in favor of its validity; and if our examination of the question shall result in only raising doubts in our minds whether it be constitutional, it will be our duty to permit the resolve to have its full force, leaving the responsibility with the legislature. On the other hand, if it be a plain and manifest departure from the provisions of the constitution;

if in passing this resolve the legislature has obviously transcended the powers conferred on the legislative departments; it is the high and solemn duty of this court, charged with expounding the laws, to give full force and effect to the constitution as the paramount law to which all legislative enactments must be subservient. The demandant insists that this resolve is invalid: 1. Because it dispenses with a standing law in favor of an individual. 2. It is legislating for a particular case. 3. It is an act judicial in its nature and character. Then it is contended that these objections, if sustained, show a case where the legislature has acted in violation of those limitations and restrictions contained in the constitution of Massachusetts, and particularly the following provisions of the bill of rights: Art. 10. "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws;" Art. 11. "Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character;" Art. 12. "No subject shall be deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land;" Art. 30. "The legislative department shall never exercise the executive and judicial powers, or either of them."

The counsel for the demandant has, with great diligence and ability, called to his aid, in the enforcement of the principles for which he contends, the numerous decisions which have been made in the courts of our sister states upon a course of legislation which had been somewhat freely indulged in, here and elsewhere, under the vague notion of an almost unlimited power to legislate for the public welfare. Thus we find acts of legislative bodies, granting new trials in cases pending before judicial tribunals; acts suspending the operation of statutes of limitations, barring actions at law; acts opening anew commissions of insolvency which had been closed by the general laws; and acts releasing a debtor imprisoned on execution, and discharging his body from arrest for a limited time. All these enactments, in some of which our own legislature has concurred, have resulted from a want of proper regard for those wise and salutary restrictions which the framers of the constitution had imposed upon the powers of the legislative department. These cases have passed in review before the judicial tribunals, and have been declared to be inconsistent with the principles of the constitutions of the various states in which these questions have

been raised; and this course of legislation, it is understood, has been abandoned: *Ward v. Barnard*, 1 Aik. 121; *Staniford v. Barry*, Id. 814 [15 Am. Dec. 691]; *Town of Bradford v. Brooks*, 2 Id. 284 [16 Am. Dec. 715]; *Kendall v. Dodge*, 3 Vt. 360; *Hill v. Town of Sunderland*, Id. 507; *Starr v. Robinson*, 1 P. Chip. 257 [6 Am. Dec. 732]; *Holden v. James*, 11 Mass. 396 [6 Am. Dec. 174]; *Picquet's Case*, 5 Pick. 65; *Merrill v. Sherburne*, 1 N. H. 199 [8 Am. Dec. 52]; *Lewis v. Webb*, 3 Greenl. 326; *Durham v. Lewiston*, 4 Id. 140; *Bates v. Kimball*, 2 Chip. 77; *Keith v. Ware*, 2 Vt. 174, and *Lyman v. Mower*, Id. 517.

The counsel for the demandant urges upon us, that the precedents, or judicial decisions, do not stop here, but will be found to go so far as to embrace the case now before the court. An opinion is cited of the justices of the superior court of New Hampshire, published in 4 N. H. 572-574, given in answer to certain questions propounded to them by the legislature of that state, embracing, among others, the following: "Can the legislature authorize a guardian of minors, by a special act or resolve, to make a valid conveyance of the real estate of his ward?" To this question, thus submitted, they reply, that the legislature has not constitutional power to pass such special act or resolve. This opinion, from so highly respectable a judicial tribunal, is certainly entitled to much consideration. But it is to be borne in mind, that it is an opinion given upon an abstract question, an *ex parte* opinion, without hearing arguments, without the aid of the learning and talent of the bar, which so materially contribute to the thorough sifting of a case, and preparing the way for a sound legal opinion. And we must take it in connection with the opinions and adjudications of other judicial tribunals; the law of Massachusetts, as long expounded and practiced upon; and the result to which our own deliberately formed opinions upon the question shall lead us. The case of *Wally's Heirs v. Kennedy*, 2 Yerg. 554 [24 Am. Dec. 511], cited by the demandant's counsel, does not seem to apply to the general question here raised, but rather to an enactment restraining and regulating private rights in cases of judicial proceedings.

To some extent certainly, a different view from that taken of this matter by the court in New Hampshire has prevailed. Thus in the constitution of the state of New York, art. 7, sec. 1, is contained the following provision: "No member of this state shall be deprived of any of the rights and privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." In the case of *Clarke v. Van Surlay*, 15,

Wend. 436, where the rents and profits of real estate were given to a father during life, and the remainder in fee to his children, a private act of the legislature, authorizing a sale of this estate for the purpose of furnishing support for the tenant for life and his children, and educating the children, was held valid. The question was fully considered and ably discussed by Mr. Justice Bronson, in giving the opinion of the supreme court. This case afterwards came before the court for the correction of errors, and the decision of the supreme court was affirmed; Chancellor Walworth and Senator Verplanck concurring in the affirmation: *Cochran v. Van Surley*, 20 Wend. 365. In the case of *Estep v. Hutchman*, 14 Serg. & R. 435, effect was given to a private statute authorizing a sale of lands by guardians. See also *Bambaugh v. Bambaugh*, 11 Id. 191. In *Wilkinson v. Leland*, 2 Pet. 627, a special statute of the state of Rhode Island, ratifying and confirming the sale and conveyance of land, which had been made by an executor without legal authority, was held to be valid. The statutes in these cases, it will be perceived, were obnoxious to the same objection now urged against the resolve before us. They were legislating for a particular case, dispensing with the general standing law, in favor of an individual, and changing the legal title to real estate, taking it from one man and vesting it in another, without judicial sentence or judgment by his peers.

But a case more in point, as an authoritative decision, is that of *Rice v. Parkman*, 16 Mass. 326, where this court held that the legislature have authority to pass an act licensing the sale of real estate of a minor, and this notwithstanding they have, by a general act, delegated the same power to the judicial courts. The opinion of the court in that case, as given by the late Chief Justice Parker, is full to the point in controversy. It holds that the power thus exercised is not judicial, "for it was not a case of controversy between party and party, nor is there any decree or judgment affecting the title to property. The only object of the authority granted by the legislature was, to transmute real into personal estate, for purposes beneficial to all who were interested therein." It is "the use of a parental or tutorial power. It is, in fact, protecting him in his property." Again; it was there said by the court, that it was no objection, that the legislature had before made a general provision for licensing the sale of minors' estates; nor that notice was not given to the minor before passing the resolve. Then we have an uninterrupted course of legislation of a similar character, for the period of sixty-four

years that have elapsed since the adoption of the constitution which is supposed by the demandant to contain provisions controlling and restraining such exercise of legislature power. It has been again and again said by this court, and by various judges, that the construction of the constitution, given by the legislature by a long-continued course of legislative acts, ought to have great weight in the consideration of a question like the present; and is not to be overruled unless manifestly erroneous. The vast amount of property, now held under titles derived from similar legislative acts, should lead us to proceed most cautiously in the investigation of this subject, and to deal with it in a liberal spirit, when called upon judicially to declare that this course of legislation conflicts with the constitution, and that all the special acts of this character are of no validity.

After much reflection upon the subject, we are not satisfied that the legislature, in passing this resolve, transcended its constitutional powers. The act was not a judicial one. The proceeding does not deprive the party of his property. The only effect was to change his estate from real to personal assets; the legal interest in the property, or the avails thereof, being wholly secured for his benefit. It was an act passed by the legislature upon the application of Davison's guardian, the person whom the law had placed as the legal representative to watch over and protect the interest of the ward, and must be assumed to have been done not adversely to his interest, but for his benefit. We think the same principles which were applied in *Rice v. Parkman* must be adopted here, and will govern the present case.

The effect which has been judicially given to other legislative acts, equally or more obnoxious to the objection of being in violation of the same provisions of the constitution, is also a fit subject for our consideration, in deciding the present case. Thus it has been held, that the legislature may constitutionally enact laws to render valid and legal the doings of public officers; to confirm the acts of towns and other corporations, invalid for some informality; although by such enactments individuals may be deprived of rights previously vested: *Walter v. Bacon*, 8 Mass. 468; *Patterson v. Philbrook*, and *Locke v. Dane*, 9 Id. 151, 360. The decisions as to the act of 1785, c. 62, sec. 4, prescribing a new rule of law as to estates in joint tenancy, were, that although extending to past grants and devises, yet it was constitutional. It was said by Parsons, C. J., in *Holbrook v. Finney*, 4 Id. 568 [8 Am. Dec. 243], "there seems to be no constitutional objection to the power of the legislature to alter a tenure, by substi-

tuting another more beneficial." See also *Annable v. Patch*, 8 Pick. 363. Yet here was a change of tenure, and it might be, in some cases, a material one to the interests of the party, whether the estate was to be held in joint tenancy or tenancy in common. These cases tend strongly to show the views which have been taken by the court of questions of this general character, and confirm us in the opinion that acts of the legislature are not to be set aside as unconstitutional, unless most clearly in conflict with the provisions of the constitution.

We have not thought it necessary to consider particularly one point somewhat discussed upon the argument of the case, viz., whether the legislature had, by the general laws of the commonwealth in force at the time of passing this resolve, given authority to the courts, or any of them, to grant license to a guardian to sell real estate for the purpose for which this sale was authorized and made. It would seem doubtful whether such sale could have been authorized by the general laws; it being to raise money to pay off a mortgage on other real estate of the ward, and it not appearing that the ward was personally liable for the debt secured by that mortgage. It was a case at least of doubtful authority, and furnished so far a special reason for a particular act. But upon the authority of *Rice v. Parkman*, if it were otherwise, the result could not be affected.

Another objection taken to the validity of the conveyance under which the tenants claim is, that William T. Spear was not the legally constituted guardian of Andrew C. Davison. The objection arises from the supposed want of notice of the proceedings in the probate court. No such objection exists here as was found in the cases of *Chase v. Hathaway*, 14 Mass. 222, and *Hathaway v. Clark*, 5 Pick. 490. Here was due notice of the proceedings before making inquisition; and the only alleged defect in the subsequent proceedings is the want of notice from the probate court of the time when the decree of the court, upon the question on which it had fully heard all the parties, should be entered. We think this should not vacate the decree appointing a guardian. The parties interested should, so far as necessary, give their attendance in court, or take other proper means to be informed as to the time when judgment is to be pronounced in a case pending in court, which has been heard, and only awaits the decision of the judge. In the court of probate, it is even less necessary for the security of a party than in other courts, that the precise time of the entering of judgment should be notified to him, as the party aggrieved may

file his appeal after the adjournment of the court; and in case of omission to enter it, through any accident or mistake, the statute gives him the further right to petition this court for leave to enter an appeal out of the prescribed rule in other cases. Whether a resolve of the legislature would be avoidable on this ground, or whether a sale by a guardian *de facto*, and who was authorized to make such sale, by the express recital of his character as guardian in the resolve, would not be good and valid in law to vest the estate in the purchaser, we have not thought necessary to consider; as we are of opinion that Mr. Spear was legally appointed guardian to Davison.

Demandant nonsuit.

SPECIAL STATUTE AUTHORIZING SALE OF LAND OF WARD, or of a deceased person, constitutionality of: See *Cochran v. Van Surlay*, 32 Am. Dec. 570, and the note thereto, discussing this subject. See also *Lane v. Dorman*, 36 Id. 543, and other cases cited in the note thereto. That a special statute authorizing the sale of land of a minor or lunatic, or of a decedent's estate by a guardian or executor, and the investment of the proceeds on the same trusts, is valid, is held, citing the principal case, in *Sohier v. Massachusetts General Hospital*, 3 Cush. 483; *Forster v. Forster*, 129 Mass. 564; *Brenham v. Davidson*, 51 Cal. 352, 359; *Thurston v. Thurston*, 6 R. I. 296; *Hoyt v. Sprague*, 103 U. S. 635. So a statute authorizing the sale of property held in trust for a religious society, and the reinvestment of the proceeds upon the same trusts, where there is no other method of conveying the property: *Sohier v. Trinity Church*, 109 Mass. 17. So of other trust estates: *Clarke v. Hayes*, 9 Gray, 428. The case is cited also, *arguendo*, in deciding in favor of the constitutionality of a special act to confirm a prior sale and conveyance of a homestead by a husband in which the wife did not join: *Wildes v. Vanvoorst*, 15 Id. 148. But a statute taking away a right of action already accrued is unconstitutional: *Forster v. Forster*, 129 Mass. 564.

APPOINTMENT OF GUARDIAN, NOTICE OF APPLICATION FOR, ESSENTIAL: See *Hutchins v. Johnson*, 30 Am. Dec. 622. As to the necessity of notice to render an appointment of guardian *ad litem* valid, see *Grant v. Van Schoonhoven*, 37 Id. 393; *Shaefer v. Gates*, 38 Id. 164. In *Brigham v. Boston etc. R. R. Co.*, 102 Mass. 18, the principal case is cited to the point that notice of all the various steps in proceedings for the appointment of a guardian for a lunatic is not necessary to make the appointment valid.

COMMONWEALTH v. RAND.

[7 METCALF, 475.]

REDEEMED BANK-NOTES ARE SUBJECTS OF LARCENY while in possession of the issuing bank under the Massachusetts statute.

THIEF STEALING BANK-NOTES IN ONE COUNTY AND CARRYING THEM INTO ANOTHER may be prosecuted in the latter county.

INDICTMENT for stealing certain bank bills which had been redeemed by the issuing bank, and were in the custody of its

agents. The evidence was that the notes were stolen by the defendant in Norfolk and brought by him into Suffolk, where the indictment was found. The judge instructed the jury that if they believed these facts the defendant could be convicted in Suffolk, and he was accordingly convicted. The case was submitted to this court on exceptions to the instructions.

E. D. Sohier, for the defendant.

S. D. Parker, for the commonwealth.

By Court, SHAW, C. J. No question was made at the argument, though it was open on the exceptions, whether bank bills, after they are redeemed by the bank, are the subject of larceny. Bank-notes are expressly made the subject of larceny by the revised statutes, c. 126, sec. 17. Is there any implied exception of bank-notes redeemed by the bank issuing them? We think not. The bank, in the present instance, were owners of the paper, which was of some value to be re-issued, and they had the actual possession, by their agent, and the perfect right of possession. But a consideration of more importance is, that notwithstanding the bills were stolen, yet, on being passed to a *bona fide* holder, the bank would have been bound to him for the payment of them, in the same manner as if they had not been redeemed. The injury to the bank is therefore the same: *Rex v. Clark*, Russ. & Ry. 181; *United States v. Moulton*, 5 Mason, 551.

But the principal question raised was whether, if bank-notes were stolen in another county and brought by the thief into this, he could be prosecuted in this. The general rule was admitted, but it was supposed to apply only to cases of stealing property which is the subject of larceny at common law, and not to extend to bank-notes, the stealing of which is made larceny by statute. We are of opinion that there is no ground for this distinction, either in principle or upon the authorities. The ground upon which the general rule proceeds is, that it is a larceny in both counties. In contemplation of law, after the felonious taking, the goods are still the property of the owner, and he has the lawful right of possession; and therefore, any act of guilty possession and removal is a new and continued larceny: 2 East's P. C. 771; *Commonwealth v. Andrews*, 2 Mass. 14 [3 Am. Dec. 17]; *Commonwealth v. Dewitt*, 10 Id. 154. The principle on which this rule is founded extends as well to bank-notes, and other property made subject to larceny by statute, as to goods which are the subject of larceny at common law. In one of the Eng-

lish cases, it appears that where a promissory note was stolen in Yorkshire and carried into Durham, the thief was convicted in Durham. The point reserved was, not whether he could be convicted on account of the nature of the property, but on account of the lapse of time between the stealing in one county and the detection in the other. No question was made of the former point: *Rex v. Parkin*, 1 Moo. C. C. 45.

Perhaps the supposed distinction has arisen out of an exception of this kind, namely, that where the theft committed was not within the jurisdiction of the common law, but the stolen articles were brought into a county, the court would not hold it larceny in such county; as where the theft was on the high seas and within the jurisdiction of the admiralty: 1 Hawk., c. 33, sec. 52. So if the theft be in a foreign jurisdiction; as in Scotland or Ireland: 2 Russ on Crimes, 1st ed., 1153. Probably it is founded on the notion that the common law can not take notice of what constitutes larceny under another jurisdiction. But this applies solely to the point, that the place of the larceny is not within the jurisdiction of the common law, and does not affect the question, whether stealing such property is larceny by common law or by statute. It may be proper to add, that it has been repeatedly decided in this commonwealth, that the law will so far take notice of what constitutes larceny in any state of this union, that if goods are stolen in another state, and are brought by the thief into this, it is a continuing larceny here, and the thief may be convicted and punished here: *Commonwealth v. Cullins*, 1 Mass. 116; *Commonwealth v. Andrews*, 2 Id. 14 [3 Am. Dec. 17]. So where goods were stolen by two persons in the county of S., and were carried by one of them into the county of C., and afterwards the other followed into the county of C., and there assisted in the custody and disposal of the goods, it was held that both were guilty of larceny in the latter county: *Commonwealth v. Dewitt*, 10 Id. 154.

The exceptions are overruled; but as sentence has already been passed, no further judgment is necessary.

CHOSSES IN ACTION WERE NOT SUBJECTS OF LARCENY at common law, and it has been held that a statute making promissory notes subjects of larceny does not extend to bank-notes: *Culp v. State*, 26 Am. Dec. 357.

THIEF STEALING PROPERTY IN ONE STATE AND CARRYING IT TO ANOTHER may be indicted for the larceny in the latter state: *State v. Ellis*, 8 Am. Dec. 175; *State v. Seay*, 20 Id. 66. *Contra*, *State v. Brown*, 1 Id. 548. In *State v. Douglass*, 35 Id. 248, it is held that where goods are stolen in one county and carried to another, an indictment will lie in either county.

COMMONWEALTH v. ROGERS.

[7 METCALF, 500.]

RIGHT OF PEREMPTORY CHALLENGE MUST BE EXERCISED BEFORE EXAMINATION of a juror as to his bias or opinions.

WITNESS IS INCOMPETENT WHO HAS BEEN CONVICTED of receiving stolen goods knowing them to have been stolen.

TO CONSTITUTE CAPACITY TO COMMIT CRIME the accused must possess intelligence enough to have a criminal intent, and if his mental powers are so deficient that he has no will, conscience, or controlling mental power, or if through the overwhelming violence of mental disease his intellectual power is for the time obliterated, he is not a responsible moral agent and is not criminally liable for his acts.

PARTIAL INSANITY DOES NOT RELIEVE a party from criminal liability for an act, if he has sufficient capacity to distinguish between right and wrong as to that act, a knowledge that it is wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong, and receive punishment.

PARTIAL INSANITY CONSISTING OF MELANCHOLY, ACCOMPANIED BY DELUSION, of such a nature that under its influence the party has a real and firm belief of some fact not true in itself, but which, if true, would excuse his act, relieves him from criminal liability therefor.

PARTY COMMITTING HOMICIDE UNDER UNCONTROLLABLE IMPULSE, overbearing reason and memory for the time being, and resulting from a diseased state of mind, accompanied by delusion, the known tendency of which state of mind is to break out into acts of violence, is not criminally liable therefor.

PRESUMPTION IS THAT ACCUSED WAS OF SOUND MIND at the time of committing an act for which he is indicted, and to entitle him to an acquittal on the ground of insanity, he must overcome that presumption by satisfactory proof arising out of evidence introduced either by himself or by the prosecution.

OPINIONS OF PROFESSIONAL MEN ON QUESTION OF INSANITY, based upon facts proved at the trial, without any personal examination of the party, are competent evidence.

PROFESSIONAL WITNESSES ARE NOT TO JUDGE OF THE TRUTH OF TESTIMONY, upon which their opinions on a question of insanity are based.

PROPER QUESTION TO PUT TO MEDICAL EXPERT, whose opinion is sought on a question of insanity, is to ask him, if the symptoms and indications, testified to by other witnesses, are proved to the satisfaction of the jury, whether in his opinion the party was insane, and what was the nature of his insanity; what state of mind the symptoms indicate, and what the witness would expect the party's conduct to be if the party would be in any supposed circumstances.

PREPONDERANCE OF EVIDENCE OF INSANITY OF ACCUSED is sufficient to warrant an acquittal.

INDICTMENT for murder. The accused was a prisoner in the state prison, and had killed the warden of the prison. The defense was insanity. The evidence of a number of professional

witnesses was admitted on the question of insanity. In the course of the trial a question arose as to whether or not the right of peremptory challenge of a juror must be exercised before he was examined. Another question was as to the competency of a certain witness for the defense, objected to by the commonwealth on the ground of his having been convicted of receiving stolen goods, knowing them to be stolen. On these questions the court ruled as follows:

By COURT. 1. Notwithstanding the decision in *Commonwealth v. Knapp*, 9 Pick. 496 [20 Am. Dec. 491], the right of peremptory challenge, if exercised at all, must be exercised in the first instance, before the juror is interrogated as to his bias or opinions. 2. A witness who has been convicted of receiving stolen goods, knowing them to have been stolen, is incompetent. Though there is no known adjudication on this precise question, yet, whether the nature and aggravation of the offense or its moral turpitude and statute punishment are considered, it renders the convict infamous.

The following charge to the jury was delivered, after argument by

S. D. Parker, for the commonwealth, and

G. T. Bigelow and G. Bemis, for the defendant.

By COURT, SHAW, C. J. In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts. But these are extremes easily distinguished, and not to be mistaken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging, or so perverted by insane delusion, as to act under false impressions and influences. In these cases, the rule of law, as we understand it, is this: A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation

in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act, and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong and receive punishment; such partial insanity is not sufficient to exempt him from responsibility for criminal acts. If then it is proved to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree, that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse: if so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it.

The character of the mental disease, relied upon to excuse the accused in this case, is partial insanity, consisting of melancholy, accompanied by delusion. The conduct may be in many respects regular, the mind acute, and the conduct apparently governed by rules of propriety, and at the same time there may be insane delusion, by which the mind is perverted. The most common of these cases is that of monomania, when the mind broods over one idea and can not be reasoned out of it. This may operate as an excuse for a criminal act in one of two modes. 1. Either the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act: as where the belief is, that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defense. A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws, and the laws of nature. 2. Or this state of delusion indicates, to an experienced person, that the mind is in a diseased state; that the known tendency of that diseased state of the mind is to break out into sudden paroxysms of violence, venting itself in homicide or other violent acts towards friend or foe indiscriminately; so that although there were no previous indi-

cations of violence, yet the subsequent act, connecting itself with the previous symptoms and indications, will enable an experienced person to say that the outbreak was of such a character, that for the time being it must have overborne memory and reason; that the act was the result of the disease and not of a mind capable of choosing; in short, that it was the result of uncontrollable impulse, and not of a person acted upon by motives, and governed by the will.

The questions, then, in the present case, will be these: 1. Was there such a delusion and hallucination? 2. Did the accused act under a false but sincere belief that the warden had a design to shut him up, and, under that pretext, destroy his life; and did he take this means to prevent it? 3. Are the facts of such a character, taken in connection with the opinions of the professional witnesses, as to induce the jury to believe that the accused had been laboring for several days under monomania, attended with delusion; and did this indicate such a diseased state of the mind, that the act of killing the warden was to be considered as an outbreak or paroxysm of disease, which for the time being overwhelmed and superseded reason and judgment, so that the accused was not an accountable agent? If such was the case, the accused is entitled to an acquittal; otherwise, as the evidence proves beyond all doubt the fact of killing, without provocation, by the use of a deadly weapon, and attended with circumstances of violence, cruelty, and barbarity, he must undoubtedly be convicted of willful murder. The ordinary presumption is, that a person is of sound mind, until the contrary appears; and in order to shield one from criminal responsibility, the presumption must be rebutted by proof of the contrary, satisfactory to the jury. Such proof may arise, either out of the evidence offered by the prosecutor to establish the case against the accused, or from distinct evidence offered on his part; in either case, it must be sufficient to establish the fact of insanity; otherwise, the presumption will stand.

The opinions of professional men on a question of this description are competent evidence, and in many cases are entitled to great consideration and respect. The rule of law, on which this proof of the opinion of witnesses, who know nothing of the actual facts of the case, is founded, is not peculiar to medical testimony, but is a general rule, applicable to all cases, where the question is one depending on skill and science in any particular department. In general, it is the opinion of the jury which is to govern, and this is to be formed upon the proof of

facts laid before them. But some questions lie beyond the scope of the observation and experience of men in general, but are quite within the observation and experience of those whose peculiar pursuits and profession have brought that class of facts frequently and habitually under their consideration. Shipmasters and seamen have peculiar means of acquiring knowledge and experience in whatever relates to seamanship and nautical skill. When, therefore, a question arises in a court of justice upon that subject, and certain facts are proved by other witnesses, a shipmaster may be asked his opinion as to the character of such facts. The same is true in regard to any question of science, because persons conversant with such science have peculiar means, from a larger and more exact observation, and long experience in such department of science, of drawing correct inferences from certain facts, either observed by themselves or testified to by other witnesses. A familiar instance of the application of this principle occurs very often in cases of homicide, when, upon certain facts being testified to by other witnesses, medical persons are asked, whether in their opinion a particular wound described would be an adequate cause, or whether such wound was, in their opinion, the actual cause of the death, in the particular case. Such question is commonly asked without objection; and the judicial proof of the fact of killing often depends wholly or mainly upon such testing of opinion. It is upon this ground, that the opinions of witnesses, who have long been conversant with insanity in its various forms, and who have had the care and superintendence of insane persons, are received as competent evidence, even though they have not had opportunity to examine the particular patient, and observe the symptoms and indications of disease, at the time of its supposed existence. It is designed to aid the judgment of the jury, in regard to the influence and effect of certain facts, which lie out of the observation and experience of persons in general. And such opinions, when they come from persons of great experience, and in whose correctness and sobriety of judgment just confidence can be had, are of great weight, and deserve the respectful consideration of a jury. But the opinion of a medical man of small experience, or of one who has crude and visionary notions, or who has some favorite theory to support, is entitled to very little consideration. The value of such testimony will depend mainly upon the experience, fidelity, and impartiality of the witness who gives it.

One caution, in regard to this point, it is proper to give.

Even where the medical or other professional witnesses have attended the whole trial, and heard the testimony of the other witnesses, as to the facts and circumstances of the case, they are not to judge of the credit of the witnesses, or of the truth of the facts testified by others. It is for the jury to decide whether such facts are satisfactorily proved. And the proper question to be put to the professional witnesses is this: If the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of the truth of them, whether, in their opinion, the party was insane, and what was the nature and character of that insanity; what state of mind did they indicate; and what they would expect would be the conduct of such a person, in any supposed circumstances: See *Rex v. Searle*, 1 Moo. & R. 75.

The jury, after being in consultation several hours, came into court, and asked instructions upon these two questions: "Must the jury be satisfied, beyond a doubt, of the insanity of the prisoner, to entitle him to an acquittal? And what degree of insanity will amount to a justification of the offense?" In answer to the first of these questions, the chief justice repeated his former remarks on the same point, and added that if the preponderance of the evidence was in favor of the insanity of the prisoner, the jury would be authorized to find him insane. In answer to the second question, the chief justice added nothing to the instructions which he had previously given.

The jury afterwards returned a verdict of "Not guilty, by reason of insanity."

PEREMPTORY CHALLENGE OF JUROR, WHEN ALLOWED: See *Commonwealth v. Knapp*, 20 Am. Dec. 491. To the point that in Massachusetts a peremptory challenge of a juror in a capital case must be taken before the juror is examined as to his interest, bias, and opinions, the principal case is cited in *Commonwealth v. McElhaney*, 111 Mass. 439; *State v. Cameron*, 2 Chand. (Wis.) 178; *State v. Pritchard*, 15 Nev. 90. But it is otherwise in Nevada: See case last cited.

INSANITY AS DEFENSE TO INDIOTMENT FOR CRIME: For an extended discussion of this subject see the note to *State v. Marler*, 36 Am. Dec. 402. The principal case is a leading authority on this point, and is reported with an extended note in 1 Bennett & Heard's Lead. Crim. Cas. 94. It is cited and commented on and explained, on the point as to what constitutes a proper test of exonerative insanity in criminal cases, in *United States v. Holmes*, 1 Cliff. 120, 121. In *People v. Garbutt*, 17 Mich. 23, and *King v. State*, 9 Tex. App. 554, it is held, citing *Commonwealth v. Rogers*, that the burden of proof as to the insanity of the defendant in a criminal case is on the prosecution, though the defendant must take the initiative. But in *People v. Myers*, 20 Cal. 520, it is held, also citing the principal case, that the burden of proof is on the defendant.

OPINIONS OF WITNESSES AS EVIDENCE ON QUESTION OF INEPTITUDE: See *Dickinson v. Barber*, 6 Am. Dec. 58, and note; *Hathorn v. King*, 5 Id. 106; *Grant v. Thompson*, 10 Id. 119; *Rambler v. Tryon*, Id. 444; *Kinne v. Kinne*, 21 Id. 132; *Doe ex dem. Sutton v. Reagan*, 33 Id. 466. In *Beaubien v. Cicotte*, 12 Mich. 506, the doctrine of *Commonwealth v. Rogers*, on this point, is approved.

OPINIONS OF WITNESSES AS EVIDENCE GENERALLY: See *Jefferson Ins. Co. v. Cothel*, 22 Am. Dec. 567, and other cases cited in the note thereto. See, also, *Irish v. Smith*, 11 Id. 648; *Kellogg v. Krauser*, 16 Id. 480; *Simpson v. Felts*, Id. 602; *State v. Tut*, 21 Id. 508; *Harbison v. Lemon*, 23 Id. 376. In *The Clement*, 2 Curt. 369, *Commonwealth v. Rogers* is cited to the point that the opinion of an expert, to be admissible, must be based on a clear statement of the facts, and not on a reading of the depositions by the witness.

WITNESS SHOWN TO HAVE BEEN CONVICTED of receiving stolen goods, knowing them to have been stolen, is incompetent: *Rohan v. Sawin*, 5 Cush. 287, *arguendo*, citing the principal case.

COTA v. BUCK.

[7 METCALF, 588.]

TEST OF NEGOTIABILITY OF NOTE is that it must be an undertaking to pay a certain sum at all events at some time which must certainly come, and not out of a particular fund, or upon a contingent event.

NOTE IS NEGOTIABLE THOUGH OBSCURELY AND UNGRAMMATICALLY WRITTEN, where the promise is for value received to pay a certain party or bearer a certain sum, with the following addition, "it being for property I purchased of him in value at this date, as being payable as soon as can be realized of the above amount for the said property I have this day purchased of said P., which is to be paid in the course of the season now coming."

INDEBITATUS ASSUMPSIT. To support the action, the plaintiff offered in evidence an instrument signed by the defendant promising to pay a certain sum to one John Pero or bearer. The contents of said instruments are stated in the above head-note. It was objected that it was not negotiable, and that the plaintiff could not sue thereon in his own name, but the court ruled otherwise. Verdict for the plaintiff. The defendant excepted to the ruling of the court.

Lanckton, for the defendant.

Coll, for the plaintiff.

By Court, SHAW, C. J. The true test of the negotiability of a note seems to be, whether the undertaking of the promisor is to pay the amount at all events, at some time which must certainly come, and not out of a particular fund, or upon a contingent event. If it were payable on a contingency, or out of a

particular fund, it would not be negotiable. This note, we think, was payable by the promisor at all events, and within a certain limited time. The note is obscurely written and ungrammatical. But we think the meaning was this: that the signer, for value received in the purchase of property, promised to pay Pero, or bearer, the sum named, as soon as the termination of the coming season, and sooner, if the amount could be sooner realized out of the fund. Such reference to the sale of the property was not to fix the fund from which it was to be paid, but the time of payment. The undertaking to pay was absolute, and did not depend on the fund. So as to the time, whatever time may be understood as the "coming season;" whether harvest time or the end of the year, it must come by mere lapse of time, and that must be the ultimate limit of the time of payment.

Exceptions overruled.

NEGOTIABLE INSTRUMENT, WHAT IS, AND ESSENTIAL ELEMENTS OF: See *Woolley v. Sergeant*, 14 Am. Dec. 419, and the note thereto considering this subject at length. See also *Gerard v. La Coste*, 1 Id. 236; *Noland v. Ringgold*, 5 Id. 435; *Bank of United States v. Sill*, 13 Id. 44, and note; *Bank of Kentucky v. Sanders*, Id. 149; *Cook v. Satterlee*, 16 Id. 432; *Franklin v. March*, 25 Id. 462; *Kimball v. Huntington*, Id. 590; *Reeside v. Knox*, 30 Id. 247; *Kendall v. Galvin*, 32 Id. 141; *Thompson v. Sloan*, 35 Id. 546; *Putnam v. Crymes*, 36 Id. 250; *State Bank v. Aersten*, Id. 536; *McLaren v. Watson's Ex'rs*, 37 Id. 260, and note; *United States v. White*, Id. 374; *Rankin v. Sanders*, 38 Id. 431; *Kirkpatrick v. McCullough*, 39 Id. 158. A promise to pay absolutely, though a clause is added to show how the money is expected to be applied by the payee, constitutes a note a negotiable instrument: *Wright v. Irwin*, 33 Mich. 34; *Taylor v. Curry*, 109 Mass. 36, 37, both approving the test of negotiability laid down by Shaw, C. J., *supra*. But a contingent promise to pay a certain time after the date of the note, in case other notes, for which it is given as collateral security, are not paid, renders a note non-negotiable: *Haskell v. Lambert*, 16 Gray, 593. So a promise to pay a certain time after the arrival of a certain vessel: *Grant v. Wood*, 12 Gray, 220.

COMMONWEALTH v. POWER.

[7 METCALF, 596.]

RAILROAD COMPANY MAY MAKE REASONABLE REGULATIONS respecting passengers and other persons using its road or houses and buildings connected therewith, the reasonableness of such regulations depending in some measure upon the locality of the depot at which they are adopted. REGULATIONS OF RAILROAD COMPANY NEED NOT BE IN FORM OF BY-LAWS, enforced by penalties and forfeitures.

RAILROAD COMPANY MAY DELEGATE TO SUPERINTENDENT of a particular depot the power to make regulations for the government of persons resorting there.

LICENSEE TO PUBLIC TO ENTER RAILROAD DEPOT, except for the purpose of taking passage, is revocable.

SUPERINTENDENT OF RAILROAD DEPOT MAY PROHIBIT INNKEEPERS from coming upon the platform at such depot to solicit custom; and where the rule has been persistently violated by a particular person, he may be forcibly excluded from the platform, although he has a ticket and comes there to take passage on the train, if he does not show his ticket or declare his purpose, and the superintendent has ground to believe and does believe that he comes to solicit custom, and uses no more violence than necessary to expel him from the platform; and such expulsion is not indictable as an assault.

COMPLAINT before a justice for an assault and battery alleged to have been committed on one Hall. The defendant Power was superintendent of the Western Railroad depot at Pittsfield and the other defendants were servants of the company. The innkeepers of Pittsfield, of whom Hall was one, had been in the habit of coming to the station on the arrival of trains to solicit custom for their houses, and this having become a great annoyance to passengers, the superintendent had made a rule and sent written notice thereof to Hall and the other innkeepers forbidding them from soliciting custom at the depot on pain of being excluded from the platform. Hall had repeatedly violated this rule, and had finally been forbidden to come upon the platform at all. On the day of the alleged assault, Hall, who had purchased a ticket through another person, came to the station to take the train for Richmond. On his way to the platform he was met by Power, who, believing that he was going to solicit passengers, told him that he could not go there, and putting his hands on him ordered him away. Hall, without showing his ticket or stating that he intended to take passage on the train, undertook to push by Power to the platform. Power, without inquiring as to his purpose, summoned the other defendants, and forcibly ejected Hall from the depot without unnecessary violence, which was the assault complained of. The defendants were convicted before the justice, and appealed to the common pleas, where they were again convicted, the court holding that the facts above stated constituted no defense. The judge, however, reported the facts for the opinion of this court.

R. A. Chapman and Coll, for the defendants.

Bishop, for the commonwealth.

By Court, **SHAW, C. J.** This is a criminal prosecution instituted against Power and several of his assistants acting under his orders, charging an assault and battery upon the complain-

ant, Timothy Hall. It comes before the court upon a report of the evidence. It appears that the learned judge did not give detailed instructions to the jury, upon the questions of law arising in the case; but the evidence being stated, the jury were directed that the facts stated did not constitute a defense; and a verdict, under that instruction, was rendered against the defendants. If it was competent for the jury, consistently with the rules of law, to render a verdict for the defendants upon this evidence, then the verdict should be set aside and a new trial granted. It becomes then necessary to inquire what the rules of law are, and how they apply to the evidence reported.

The court are of opinion, that the railroad corporation, both as the owners and proprietors of the houses and buildings connected with the railroad, and as carriers of passengers, have authority to make reasonable and suitable regulations in regard to passengers intending to pass and repass on the road, in the passenger cars, and in regard to all other persons making use of such houses and buildings. This authority is incident to such ownership of the real estate, and to their employment as passenger carriers; and all such regulations will be deemed reasonable, which are suitable to enable them to perform the duties they undertake, and to secure their own just rights in such employment; and also such as are necessary and proper to insure the safety and promote the comfort of passengers. The reasonableness of such regulations must in some measure be judged of with reference to the particular depot at which they are adopted. Regulations may be proper and necessary at one of the termini of the road, where there is usually a great throng of passengers and other persons connected with the business of the road, which would not be required at a way station, where few persons enter or leave the cars, and where they stop but a few moments. And we are also of opinion, that the regulations, thus to be made and enforced, are not necessary to be made in the form of by-laws, to be carried into effect by penalties and prosecutions. Such by-laws are rather the regulations which a corporation have power to make in respect to the government of their own members, and of their corporate officers, or of municipal corporations, that exercise, to a limited extent, the powers of government. But the regulations in question are such as an individual, who should happen to be the sole owner of the depots and buildings, and of the railroad cars, would have power to make, in virtue of his ownership of the estate, and of his employment as a carrier of passengers.

That a railroad corporation are to be deemed carriers of passengers, and are subject to the duties, and entitled to the privileges and powers incident to such employment, seems to be settled by various cases, in which suits have been sustained by and against them. They are in this respect on the footing of owners of steamboats. Both are modern modes of conveyance; but the rules of the common law are applicable to them, as they take the place of other modes of carrying passengers: *Jencks v. Coleman*, 2 Sumn. 221; *Camden and Amboy Railroad Co. v. Burke*, 13 Wend. 611 [28 Am. Dec. 488]; *Pardee v. Drew*, 25 Id. 459; *Pickford v. Grand Junction Railway Co.*, 8 Mee. & W. 372. An owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered, but he is bound, so to regulate his house, as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and of course he has a right, and is bound, to exclude from his premises all disorderly persons, and all persons not conforming to regulations necessary and proper to secure such quiet and good order: *Markham v. Brown*, 8 N. H. 523 [31 Am. Dec. 209]. We are also of opinion, that the power which the company thus have to regulate their several depots, they may delegate to suitable officers. Indeed, it is the only mode in which a corporation can exercise their powers. And where they have appointed a superintendent, with authority, by himself and his assistants, to have charge of the depot and manage its concerns, it is incident to his authority to exclude, or direct the exclusion of persons who persist in violating the reasonable regulations prescribed, and thereby interrupt the officers and servants of the company in the discharge of their respective duties, or annoy passengers.

If it be insisted, that by opening the doors of their depots, the company give an implied license to any and all persons to enter, it may be answered, that by thus opening their doors, they do, *prima facie*, give an implied license to all persons to enter, and no person is a trespasser by merely entering therein. But all such licenses are in their nature revocable; and if actually revoked, and due notice given to an individual or class of individuals, and they still persist in entering, it is without a license, and the owner has a right to exclude them by force, if necessary, using no more force than is necessary for that purpose: *Weaver v. Bush*, 8 T. R. 78. Without such a power, the

business could not be carried on; because the crowd of persons entering, without intending to take passage, might be so great as to exclude passengers.

In regard to the fact that Hall had a ticket at the time, and intended *bona fide* to go in the cars to Richmond, it appears to us that a fact within his own private knowledge, not communicated to the superintendent, when it was in his power to communicate it, can not place the superintendent in the wrong, in a case where he would be otherwise justified. If Hall had repeatedly violated a reasonable regulation, in going upon the platform when expressly prohibited, and if the superintendent had reasonable ground to believe that he was repeating such violation, and he gave no notice that he then came there for another purpose, when it was in his power to do so, the superintendent and his assistants, acting on reasonable grounds of belief, must stand on the same ground of justification in this respect, as if Hall had no such purpose.

We are therefore of opinion, that upon the evidence detailed in the judge's report, the jury should be instructed in a manner somewhat as follows: That if Power had been placed in charge of the depot by the corporation, as superintendent, he had all the authority of the corporation, both as owners and occupiers of real estate, and also as carriers of passengers, incident to the duty of control and management: That this power and authority of the corporation extended to the reasonable regulation of the conduct of all persons using the railroad, or having occasion to resort to the depots for any purpose: That this power was properly to be executed by a superintendent adapting his rules and regulations to the circumstances of the particular depot under his charge; and that it was not necessary that such regulations should be prescribed by by-laws of the corporation: That the opening of depots and platforms for the sale of tickets, for the assembling of persons going to take passage or landing from the cars, amounts in law to a license to all persons, *prima facie*, to enter the depot, and that such entry is not a trespass; but that it is a license conditional, subject to reasonable and useful regulations; and, on non-compliance with such regulations, the license is revocable, and may be revoked either as to an individual, or as to a class of individuals, by actual or constructive notice to that effect: That if the platform, as part of the depot, is appropriated to and connected with the entrance of passengers into the cars, and the exit of passengers from the cars, and for the accommoda-

tion of their baggage, and if the soliciting of passengers to take lodgings in particular public houses by the keepers of them or their servants, is a purpose not directly connected with the carriage of passengers by the railroad, on their entrance into or exit from cars; that if, when urged with earnestness and importunity, it is an annoyance of passengers, and interruption to their proper business of taking or leaving their seats in the cars, and procuring or directing the disposition of their baggage; or if the presence of such persons, for such a purpose, is a hindrance and interruption to the officers and servants of the corporation, in the performance of their respective and proper duties to the corporation as passenger carriers; then the prohibition of such persons from entering upon the platform is a reasonable and proper regulation, and a person who, after actual or constructive notice of such regulation, violates or attempts to violate it, thereby loses his license to enter the depot; that such license as to him may be revoked; and if, upon notice to quit the depot, he refuses so to do, he may be removed therefrom by the superintendent and the persons employed by him; and if they use no more force than is necessary for that purpose, such use of force is not an assault and battery, but is justifiable: That as to the circumstances of the present case, if the superintendent had issued a circular, giving notice to all innkeepers and landlords, that he had prohibited them from entering the depot to solicit persons to go to their respective houses as guests, and if this notice came to Hall, and he afterwards, and after special notice to him personally, had attempted to violate this prohibition, and solicit passengers; and if, upon the particular occasion, he gave no notice of coming for any other purpose; and if the defendant Power met him on his way to the platform, told him he must not go there, laid his hands on him, and ordered him to leave the depot, without any inquiry as to the purposes of Hall, and Hall made no reply, but pressed forward and attempted to reach the platform, in spite of the efforts of Power; this was strong *prima facie* evidence that he was going there with intent to solicit passengers, in violation of the notice and revocation of license; and that if he gave no notice of his intention to enter the car as a passenger, and of his right to do so; and if Power believed that his intention was to violate a subsisting reasonable regulation; then he and his assistants were justified in forcibly removing him from the depot: That if Hall gave no notice of his having a ticket, of his intention and purpose to enter the cars as a passenger, and of his right to do so, and that Power had no notice of it, then Hall could not justify his con-

duct, and make Power a wrong-doer, by proving the possession of such a ticket, or of his intent to go in the cars to Richmond as a passenger; and that he was to be considered as standing on the same footing as if he had not possessed such ticket.

New trial granted.

REGULATIONS WHICH RAILROAD COMPANIES MAY MAKE RESPECTING PASSENGERS AND OTHERS NOT EMPLOYEES.—The right of a railroad company or other carrier to make reasonable regulations within the limits of its charter for the management of its business, and for the safety, comfort, and convenience of its passengers and other patrons, is beyond question: *Thomp. on Car.* 335; *Jencks v. Coleman*, 2 Sumn. 221; *Merrihue v. Milwaukee etc. R. R. Co.*, 5 Am. L. Reg. 364; *Chicago etc. R. R. Co. v. Williams*, 55 Ill. 185; *State v. Chovin*, 7 Iowa, 204; *Day v. Owen*, 5 Mich. 520; S. C., *Thomp. on Car.* 306; *People v. Jilison*, 3 Park. Cr. 234; *Pennsylvania R. R. Co. v. Langdon*, 92 Pa. St. 21; *Houston etc. R. R. Co. v. Moore*, 49 Tex. 31; *Stephen v. Smith*, 29 Vt. 160; *Gleason v. Goodrich T. Co.*, 32 Wis. 85. But no regulation or by-law, which is inconsistent with any provision in the charter of the company or with any general law, is valid: *Chicago etc. R. R. Co. v. People*, 56 Ill. 365; *Merrihue v. Milwaukee etc. R. R. Co.*, 5 Am. L. Reg. 364; *Williams v. Great Western Ry. Co.*, 10 Ex. 15. Thus where there is a general law allowing passengers to carry a certain quantity of baggage without extra charge, a by-law requiring baggage to be booked and the carriage paid, in order to render the company liable for its safety, is held to be unreasonable and void: *Williams v. Great Western Ry. Co.*, 10 Ex. 15. The soundness of this decision is questioned, however, by Judge Redfield, in 1 Redf. on Railw. 92, note. Nor can a railroad company make any rule which infringes the right of a passenger to be carried, for the right to carriage is superior to any regulation of the company: *Day v. Owen*, 5 Mich. 520; S. C., *Thomp. on Car.* 306. A rule, to be valid, must be general and permanent in its nature, and not made for a particular occasion or emergency: *Id.* But the occasional non-enforcement of a rule does not abrogate it so as to prevent its enforcement in other cases: *Chicago etc. R. R. Co. v. Williams*, 55 Ill. 185; *Bass v. Chicago etc. R. R. Co.*, 36 Wis. 450; S. C., *Thomp. on Car.* 311. And in order to enable the company to enforce a by-law it must itself conform to it: *Jennings v. Great Northern Ry. Co.*, L. R., 1 Q. B. 7.

REASONABLENESS, THE TEST OF VALIDITY OF—WHO TO JUDGE OF REASONABLENESS.—The reasonableness of a rule adopted by a railroad company respecting its passengers, freighters, or other persons using its road or buildings is the test of its validity. The fact that it is lawful is not enough: *State v. Overton*, 24 N. J. L. 435. It must be reasonable, and must also be enforced in a reasonable manner: *Chicago etc. R. R. Co. v. Williams*, 55 Ill. 185; *Bass v. Chicago etc. R. R. Co.*, 36 Wis. 450; S. C., *Thomp. on Car.* 311. For example, a rule forbidding conversation among passengers, or prohibiting them from changing their seats, when the rights of other passengers were not infringed thereby, would be unreasonable and void: *State v. Overton*, 24 N. J. L. 435, per Ogden, C. J.

There is some difference of opinion as to whether the reasonableness of a rule of a railroad company is to be determined by the jury or by the court. In some cases it is held that the reasonableness of regulations, other than by-laws, is a question of fact for the jury: *State v. Overton*, 24 N. J. L. 435; *State v. Chovin*, 7 Iowa, 204. In the former of these two cases it was said, how-

ever, that the validity of a by-law is a question for the court. In other cases the reasonableness of all the rules and regulations of a railroad company is held to be a question of law, to be determined by the court: *Illinois etc. R. R. Co. v. Whittemore*, 43 Ill. 420; *Vedder v. Fellows*, 20 N. Y. 126; *Hoffbauer v. Delhi etc. R. R. Co.*, 52 Iowa, 342. The better opinion is, however, that the question is generally a mixed one of law and fact: 1 Redf. on Railw. 95; *Thomp. on Car.* 335; *Day v. Owen*, 5 Mich. 520; S. C., *Thomp. on Car.* 306; *Bass v. Chicago etc. R. R. Co.*, 38 Wis. 450; S. C., *Thomp. on Car.* 311; *Brown v. Memphis etc. R. R. Co.*, 4 Fed. Rep. 37; S. C., 7 Id. 51. So far as the reasonableness of the rule in controversy depends upon the existence of particular facts and circumstances it is necessarily a question for the jury, but if the facts are undisputed, the question is a proper one for the court to determine. Keeping this distinction in view, the cases on this subject may perhaps be reconciled without difficulty. Thus in cases where the question of the reasonableness of a rule has been held to be purely one of law, it is noticeable that the rule has been one whose validity did not depend upon any peculiar facts; such as a rule requiring extra fare to be paid on the train where passengers have not provided themselves with tickets: *Hoffbauer v. Delhi etc. R. R. Co.*, 52 Iowa, 342; or a rule requiring a passenger to surrender his ticket without a check just before reaching the last station before the end of his journey: *Vedder v. Fellows*, 20 N. Y. 126.

WHO MAY MAKE REGULATIONS FOR COMPANY.—The by-laws of a corporation must, of course, be enacted by the board of directors or other governing body of the corporation, but the regulations now under consideration are, as stated in the principal case, not properly by-laws, though they may doubtless be enacted in that form if the corporation so chooses: *State v. Overton*, 24 N. J. L. 435. These regulations may, therefore, be adopted either by the board or by the officer having charge of that particular branch of the company's business: *Merrihew v. Milwaukee etc. R. R. Co.*, 5 Am. L. Reg. 364. Agents other than directors may make regulations as to rates of fare or freight; *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1. So conductors may make rules as to the surrender of tickets, if not made by their superior officers: *Vedder v. Fellows*, 20 N. Y. 126.

EXCLUDING PERSONS NOT PASSENGERS FROM PLATFORM OR STATION.—A railway company by opening its stations no doubt gives an implied license to the public to enter them and to go upon and across its platforms, so that one coming there, in the absence of any known rule to the contrary, does not become a trespasser by so doing; but this is a mere revocable license as to all persons except those who come there at a reasonable time for the purpose of taking passage in the cars, and other persons may be compelled to depart upon request, and upon their refusal may be expelled by force: *Gillis v. Pennsylvania R. R. Co.*, 59 Pa. St. 129; *Hall v. Power*, 12 Metc. 482; *Harris v. Stevens*, 31 Vt. 79. A rule forbidding hotel-runners or omnibus drivers from coming upon the platform or entering the station for the purpose of soliciting passengers is unquestionably reasonable and salutary, especially where, as too often happens, such solicitation is carried to such an extent as to be a serious annoyance to travelers and a hindrance to the employees of the railway company in the performance of their duties: *Hall v. Power*, 12 Metc. 482; *Barker v. Midland Railway Co.*, 18 Com. B. 46; S. C., 36 Eng. L. and Eq. 253; *Landrigan v. State*, 31 Ark. 50; S. C., 25 Am. Rep. 547. One who comes to the station in reasonable time all things considered, with the intention of taking passage on a train, has an undoubted right to remain if he behaves properly, but he may be required to state his intention to become a passenger, and the

company may adopt a rule requiring all persons to purchase tickets to entitle them to remain in the station: *Harris v. Stevens*, 31 Vt. 79. Where, as in the principal case, a rule has been adopted forbidding keepers of lodging-houses or hotel-runners from coming upon the platform to solicit custom, the superintendent of the station has no right to exclude a party merely because he thinks he is going to violate the rule, without any evidence of such intention from his previous conduct or otherwise: *Hall v. Power*, 12 Metc. 482, which was a decision growing out of the same transaction as the principal case.

RULE REQUIRING PASSENGERS TO PURCHASE TICKETS AND TO EXHIBIT THEM to the conductor when requested, is manifestly reasonable and valid: *Baltimore etc. R. R. Co. v. Blocher*, 27 Md. 277; *Chicago etc. R. R. Co. v. Boger*, 1 Bradw. 472; *Pullman Palace Car v. Reed*, 75 Ill. 125; S. C., 20 Am. Rep. 232; *Frederick v. Marquette etc. R. R. Co.*, 37 Mich. 342; S. C., 6 Rep. 116; *Willets v. Buffalo etc. R. R. Co.*, 14 Barb. 585; *Hibbard v. New York etc. R. Co.*, 15 N. Y. 455; *Townsend v. New York etc. R. R. Co.*, 56 Id. 295; S. C., 15 Am. Rep. 419. The rule may be absolute that the passenger shall exhibit a proper ticket in order to entitle him to ride on the train, or, as is generally the case, he may be required, if he is not provided with a ticket, or refuses to exhibit it, to pay a higher rate of fare to the conductor. Cases of this latter sort will be treated of in another subdivision of this note. The reasonableness of rules requiring passengers to be provided with tickets, and to exhibit them when requested, consists in their obvious utility in preventing frauds upon the railway company not only by the traveling public, but also by its own servants, and in facilitating the dispatch of business. Such rules prevent disputes between passengers and conductors as to whether fare has been paid or not, and tend to confine the collection of money for fares to the proper receiving officers of the company, and thus to simplify the business of the company in accounting with its numerous employees. The passenger may be required to exhibit a ticket before he enters the cars: *Chicago etc. R. R. Co. v. Boger*, 1 Bradw. 472; or at other reasonable times after his journey has begun. The rule requiring the production of a ticket to entitle the passenger to ride in the cars, or to pay regular train fare, may be applied to the holders of commutation tickets: *Downs v. New York etc. R. R. Co.*, 36 Conn. 287; S. C., 4 Am. Rep. 77; *Ripley v. New Jersey etc. Co.*, 31 N. J. L. 388; *Bennett v. Railroad Co.*, 7 Phila. 11; *Crawford v. Cincinnati etc. R. R. Co.*, 26 Ohio St. 580; S. C., 13 Am. Railw. Rep. 387; *Woodard v. Eastern etc. R. Co.*, 30 L. J. Mag. C. 196. Indeed, there is generally a stipulation indorsed upon such tickets forming part of the contract, requiring the holder to show his ticket when requested, or to pay regular fare. If the passenger has lost his ticket, that fact does not excuse its non-production, and he must pay fare, for it is reasonable that the loss should fall on him: *Duke v. Great Western R. Co.*, 14 U. C. Q. B. 369; S. C., Id. 377; *Standish v. Narragansett etc. Co.*, 111 Mass. 512; S. C., 15 Am. Rep. 66; *Jerome v. Smith*, 48 Vt. 230; S. C., 21 Am. Rep. 125. So in case of a commutation ticket: *Ripley v. New Jersey etc. Co.*, 31 N. J. L. 388; *Crawford v. Cincinnati etc. R. R. Co.*, 26 Ohio St. 580; S. C., 13 Am. Railw. Rep. 387. So where the holder of such a ticket has left it at home: *Downs v. New York etc. R. R. Co.*, 36 Conn. 287; S. C., 4 Am. Rep. 77. So, where a passenger has received a ticket with coupons attached entitling him to ride upon certain divisions of the road, and the conductor of one division tears off the proper coupon, and gives the passenger a check therefor, which he subsequently loses, a subsequent conductor upon the same division may refuse to accept the ticket alone as evidence of his right to ride

in the car, and may eject him on his refusal to pay fare, though the passenger was ignorant of the rules of the company on that subject: *Jerome v. Smith*, 48 Vt. 230; S. C., 21 Am. Rep. 125. In some cases it has been decided that if the conductor knows that the passenger who has lost his ticket has, in fact, paid his fare, he can not eject him for refusing to pay it again: *Hibbard v. New York etc. R. R. Co.*, 15 N. Y. 455, per Comstock, J.; *Maples v. New York etc. R. R. Co.*, 38 Conn. 557; S. C., 9 Am. Rep. 434.

The case last cited was one where the passenger had a commutation ticket, but had lost it, and the conductor knew that he was a commuter whose ticket had not expired, and it was held that under such circumstances the rule requiring the exhibition of the ticket was a mere formality and did not authorize the conductor to collect fare of the passenger, unless it was expressly stipulated in the contract evidenced by the ticket. So where a passenger lost his ticket entitling him to a berth in a sleeping-car, but furnished a writing from the ticket agent showing that he had purchased his ticket, but the conductor refused to accept it and refused to allow him to occupy the sleeping-car, he was held entitled to recover from the company the price paid for his ticket and reasonable compensation for the inconvenience and annoyance arising from being deprived of his berth; and it was laid down generally that a passenger who had lost a ticket, good only for a particular day and train, ought, on satisfactory proof thereof, to be permitted to ride: *Pullman Palace Car Co. v. Reed*, 75 Ill. 125; S. C., 20 Am. Rep. 232. It is clear, however, that the doctrine of these cases requiring a conductor to accept other evidence than a proper ticket, as to a passenger's right to ride upon his train where the ticket has been lost, ought not to be applied except where there is positive knowledge or the most convincing proof of the right. To extend it beyond this limit would open the door to fraud and to vexatious controversies between conductors and passengers, to the great detriment of railroad companies and to the constant annoyance of the traveling public: *Duke v. Great Western R. R. Co.*, 14 U. C. Q. B. 377, 384. Certainly, as a general rule, a passenger's ticket is the only proper evidence as between himself and the conductor, of his right to ride on the train: *Frederick v. Marquette etc. R. R. Co.*, 37 Mich. 342; S. C., 6 Rep. 116.

WHERE A COMMUTATION OR OTHER TICKET has been wrongfully taken up by a prior conductor, a subsequent conductor may nevertheless require payment of fare upon the non-production of the ticket, and may eject the passenger if he refuses to pay, leaving him to seek his remedy against the company, not for the ejection, but for the wrongful act of the prior conductor: *Townsend v. New York etc. R. R. Co.*, 56 N. Y. 295; S. C., 15 Am. Rep. 419; *Shelton v. Lake Shore etc. R. R. Co.*, 29 Ohio St. 214. If, through the mistake of the ticket agent, a passenger is furnished with a ticket not entitling him to ride the whole distance for which he has paid fare, the conductor may require payment of fare for the extra distance, and may eject the passenger upon his refusal to pay, and the latter's remedy is not for the ejection: *Frederick v. Marquette etc. R. R. Co.*, 37 Mich. 342; S. C., 6 Rep. 116; *Chicago etc. Co. v. Griffin*, 68 Ill. 499. The passenger's right of action is for the breach of contract of carriage, in demanding fare a second time, and is complete without ejection; and he is not required, in order to perfect that right, to persist in his refusal to pay fare until he is expelled: *Chicago etc. R. R. Co. v. Griffin*, 68 Ill. 499. In the other hand, where a passenger had purchased a ticket and surrendered it to the conductor of a certain train, who gave him a check therefor which he assured him would be as good as his ticket, and would entitle him to ride upon another faster train, upon which,

by the direction of the servants of the company, he took passage, but the conductor of the latter train refused to recognize the check and ejected him from the train upon his refusal to pay fare a second time, the company was held liable for such ejection: *Toledo etc. R. Co. v. McDonough*, 53 Ind. 289. So where a passenger having paid fare on a street car, which stopped for some cause, was thereupon transferred to another car, and a second fare was demanded which he refused to pay, and was therefore ejected, the company was held liable, but not for exemplary damages: *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 25. In that case, however, the passenger was informed by the second conductor, before entering the car, that he needed no transfer. And where a passenger having purchased tickets for himself and his servants took passage with them on a certain train, keeping all the tickets in his own possession, and the train was afterwards divided, leaving the master on one train and the servants on another, and the latter being unprovided with tickets were ejected, the company was held liable in an action by the master for breach of the contract of carriage. There was a by-law of the company providing that "each passenger, on payment of his fare, will be furnished with a ticket," which he was required to exhibit and deliver up when demanded, but it was decided that the company, by not furnishing each of the servants with a ticket, had not put itself in a position to enforce its by-law against them: *Jennings v. Great Northern R. Co.*, L. R., 1 Q. B. 7. But where a person paid for tickets for himself and two companions, but, by mistake of the agent, received only two tickets, and the conductor refused to accept these facts in explanation, and ejected one of the parties for non-payment of fare, the company was held not to be liable therefor: *Weaver v. Rome etc. R. R. Co.*, 3 Thomp. & C. 270. Although the cases on this subject are not entirely consistent with each other, the doctrine deducible from them, and the correct doctrine as it seems to us, is that when one has paid his fare to a certain destination on a railway, to the officer appointed by the company to receive it, the contract for carriage is complete, and he has a right to be carried in accordance with that contract, which can not be infringed or impaired by any rule of the company or by any mistake or default of its servants. If by a mistake of one of the officers of the company he is not furnished with a proper ticket or check evidencing his right to be carried to his destination, his right nevertheless remains, and if for want of the requisite evidence of that right, another servant of the company refuses to carry him without another payment of fare, the contract is broken, and he has a complete right of action for all damages resulting from such breach. But as the rule requiring him to show a proper ticket or to pay his fare, if demanded, is a reasonable one, he will not be justified in refusing compliance with it, and in remaining in the car until forcibly expelled, merely for the purpose of heaping up damages. He should either pay the fare demanded or quit the train; and in either case we think he ought to recover, as a part of his damages, reasonable compensation for the indignity put upon him by the company through the default of its servant. But he can add nothing to his claim by remaining in the car until forcibly ejected, for the rule under which he is ejected being reasonable, is a complete protection to the company and its servants against the recovery of any damages, directly or indirectly, for an assault made necessary by his own obstinacy, if no more violence than is required for his ejection is used. Such a case stands upon an entirely different ground from that of a passenger who has a proper ticket and is nevertheless expelled.

RULE REQUIRING SURRENDER OF TICKET.—A rule requiring passengers to surrender their tickets soon after starting on their journey, and to take the

conductor's checks therefor, is no doubt reasonable, and a passenger refusing to comply with the rule or to pay fare may be ejected, or if he leaves the train without giving up his ticket he may be sued for his fare: *Northern etc. R. R. Co. v. Page*, 22 Barb. 130; *People v. Cary*, 3 Park. Cr. 326. So, a rule requiring passengers on a steamboat to surrender their tickets on going ashore is reasonable: *Standish v. Narragansett etc. Co.*, 111 Mass. 512; S. C., 15 Am. Rep. 66. But a rule requiring railway passengers to surrender their tickets at a distance from their destination, without receiving checks therefor, where several stations intervene, is unreasonable: *State v. Thompson*, 20 N. H. 250. But it is otherwise as to a rule requiring a surrender of tickets without giving out checks, just before reaching the last station before the end of a passenger's journey: *Vedder v. Fellows*, 20 N. Y. 126; or just after leaving the last station: *Illinois etc. R. R. Co. v. Whittemore*, 43 Ill. 420. A passenger having surrendered his ticket is entitled to ride to the end of his journey whether he has received a check or not: *Chicago etc. R. R. Co. v. Griffin*, 68 Id. 499; and if he is expelled from the train for non-payment of fare upon a change of conductors the company is liable: *Pittsburg etc. R. R. Co. v. Henrich*, 39 Ind. 509. Where a passenger's ticket entitles him to a seat, he can not be required to surrender it until a seat is furnished: *Davis v. Kansas City etc. R. R. Co.*, 53 Mo. 317; S. C., 14 Am. Rep. 457. But he can not remain on the train until he obtains a seat and then tender fare only for that part of the journey during which he has been provided with a seat: Id. And where the seats in a particular car are all occupied the conductor is not bound to furnish a passenger with a seat in that car before requiring him to surrender his ticket, where there are vacant seats in another car, as for instance the smoking-car, although the passenger insists that he can not ride in that car without injury to his health: *Pittsburg etc. R. R. Co. v. Van Houten*, 48 Ind. 90.

EJECTING PASSENGER FOR NOT SHOWING OR SURRENDERING TICKET OR PAYING FARE.—It is a universal rule among railway companies to eject passengers who refuse, upon proper demand, to show or surrender their tickets, or pay fare, and its reasonableness is beyond question, for by such refusal a passenger becomes a mere trespasser: *Ohio etc. R. R. Co. v. Muhling*, 30 Ill. 9; *Chicago etc. R. R. Co. v. Roberts*, 40 Id. 503; *State v. Overton*, 24 N. J. L. 435. So, though, as already stated, the passenger may be a commuter who has lost his ticket by theft or otherwise: *Ripley v. New Jersey etc. Co.*, 31 Id. 388; *New York etc. R. R. Co.*, 36 Conn. 287; S. C., 4 Am. Rep. 77, and other cases above cited. The conductor must, however, before ejecting a passenger for non-payment of fare use reasonable diligence to ascertain whether he has a proper ticket. If he produces a ticket which the conductor suspects that he has not paid for, owing to information furnished by a ticket agent, and the conductor ejects him without proper inquiry, the company is liable in case the ticket turns out to have been correct: *Quigley v. Central etc. R. R. Co.*, 11 Nev. 350.

The company will be liable also if the passenger assures the conductor that he has a ticket but has mislaid it, and begins to search for it, if he is ejected without giving him reasonable time to find it: *Curtis v. Grand Trunk R. Co.*, 12 U. C. C. P. 89; *Maples v. New York etc. R. R. Co.*, 38 Conn. 557; S. C., 9 Am. Rep. 434. But if the passenger has no ticket the conductor has a right to know at once whether he will pay his fare or not. If the passenger says that he has not decided how far he will go, and is told that he must decide, and upon being again interrogated, makes the same excuse, he may be put off the train without further inquiry: *Fulton v. Grand Trunk R. Co.*, 17

U. C. Q. B. 428. A rule forbidding the acceptance of a ticket or payment of fare by or on behalf of a passenger after his ejection unless it be at a regular station, is reasonable, and the conductor may refuse to admit him again upon the train: *O'Brien v. Boston etc. R. R. Co.*, 15 Gray, 20; S. C., Thomp. on Car. 22; *Nelson v. Long Island R. R. Co.*, 7 Hun, 140; *O'Brien v. New York etc. R. R. Co.*, 80 N. Y. 236; *Fulton v. Grand Trunk R. Co.*, 17 U. C. Q. B. 428. And the conductor is not required to accept a tender of fare even before ejection if the train has been stopped to put the passenger off: *People v. Jillion*, 3 Park. Cr. 234; *Stone v. Chicago etc. R. R. Co.*, 47 Iowa, 82; S. C., 29 Am. Rep. 458. Nor can the passenger save himself by showing his ticket after the train has been stopped to eject him: *Hibbard v. New York etc. R. Co.*, 15 N. Y. 455. The unreasonableness of allowing a passenger thus to experiment with the conductor is apparent. If it were permitted, the stoppages which might be occasioned by refractory passengers would be an intolerable annoyance not only to the carrier, but to other passengers. But if a passenger is ejected for non-payment of fare at a regular station, he may, no doubt, re-enter the car upon tendering a ticket or payment of fare: *Nelson v. Long Island R. R. Co.*, 7 Hun, 140. So a tender before ejection, but after a stoppage of the train at a regular station, is good: *O'Brien v. New York etc. R. R. Co.*, 80 N. Y. 236. But it is held that even where a passenger is ejected at a regular station he can not again take passage by offering merely a ticket from that station, without paying fare from the station from which he originally came: *Stone v. Chicago etc. R. Co.*, 47 Iowa, 82; S. C., 29 Am. Rep. 458. No unnecessary violence can be used in ejecting a passenger: *Kline v. Central Pacific R. R. Co.*, 37 Cal. 400; *State v. Ross*, 26 N. J. L. 224, and other cases cited in this note. If, before ejection, the passenger tenders a ticket which the conductor holds not to be a proper ticket, he can not retain it against the passenger's protest and still eject him: *Vankirk v. Pennsylvania R. R. Co.*, 76 Pa. St. 66; S. C., 18 Am. Rep. 404. If he does so the company is liable: *Id.* On the other hand, where the passenger tenders a certain sum which the conductor claims is not sufficient, it is held that the conductor may retain it to cover the distance already traveled and still eject the passenger, although he tenders the full fare after the train is stopped: *Delhi etc. R. Co.*, 52 Iowa, 342; S. C., 35 Am. Rep. 278.

In the absence of any statute providing that passengers shall be ejected from railway trains for non-payment of fare, only at regular stations, the better opinion is that a passenger may for this cause be put off at a distance from any station, if he is not thereby wantonly exposed to peril: *Great Western R. Co. v. Miller*, 19 Mich. 306; *McClure v. Philadelphia etc. R. R. Co.*, 34 Md. 532; S. C., 6 Am. Rep. 532. But in *Muples v. New York etc. R. R. Co.*, 38 Conn. 557; S. C., 9 Am. Rep. 434, it is held that a rule for the ejection of passengers elsewhere than at stations for non-payment of fare, is unreasonable and void. In Illinois, there is a statute providing for the ejection of passengers for this cause at the usual stopping-places, and this is held to prohibit putting off a passenger for non-payment of fare elsewhere than at a station: *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 460; *Chicago etc. R. R. Co. v. Peacock*, 48 Id. 253. But the contrary is held under a similar statute in Indiana: *Toledo etc. R. R. Co. v. Wright*, 68 Ind. 586; S. C., 34 Am. Rep. 277. And even where such a statute is held to restrict the right to an ejection at a usual stopping-place, it is held not to apply to one who, after ejection at a station, again jumps upon the train as it is moving out: *Chicago etc. R. R. Co. v. Boger*, 1 Bradw. 472; *Kent v. Mason*, Id. 466. Or to one who enters the train with the deliberate intention of not paying his fare, for the purpose

of testing his right to ride upon a ticket which, by the rules of the company, has expired: *Lillis v. St. Louis etc. R. Co.*, 64 Mo. 464. Under the Vermont statute, a passenger can be ejected only at a regular station for refusing to pay extra fare demanded of him because he has not purchased a ticket: *Stephen v. Smith*, 29 Vt. 160.

RULES AS TO CARRYING PASSENGERS ON FREIGHT TRAINS.—A railway company may undoubtedly require freight and passengers to be carried on different trains, if sufficient accommodations are provided for both, and may therefore make and enforce a rule forbidding passengers to be carried on freight trains: *Houston etc. R. Co. v. Moore*, 49 Tex. 31; *Chicago etc. R. R. Co. v. Randolph*, 53 Ill. 510; *Illinois etc. R. R. Co. v. Johnson*, 67 Id. 312; *Eaton v. Delaware etc. R. R. Co.*, 57 N. Y. 382. Or it may require passengers on freight trains to provide themselves with a certain kind of ticket before starting, and may expel those who fail to comply with the rule: *Evans v. Memphis etc. R. R. Co.*, 56 Ala. 246; *Illinois etc. R. R. Co. v. Nelson*, 59 Ill. 110; *Toledo etc. R. R. Co. v. Patterson*, 63 Id. 304; *Arnold v. Illinois etc. R. R. Co.*, 83 Id. 273; *St. Louis etc. R. R. Co. v. Myrtle*, 51 Ind. 566; *Falkner v. Ohio etc. R. Co.*, 55 Id. 369; *Law v. Illinois etc. R. R. Co.*, 32 Iowa, 534; *Kansas etc. R. Co. v. Kessler*, 18 Kan. 523; *Burlington etc. R. R. Co.*, 11 Neb. 177; *S. C.*, 1 Am. and Eng. R. R. C. 253; *Indianapolis etc. R. R. Co. v. Kennedy*, 3 Id. 467; *Cleveland etc. R. R. Co. v. Bartram*, 11 Ohio St. 457. Or it may, it seems, restrict its liability for the safety of passengers carried on such trains: *Arnold v. Illinois etc. R. R. Co.*, 83 Ill. 273. Due notice must, however, be given of the rule requiring passengers on such trains to provide themselves with tickets of a particular kind beforehand: *Falkner v. Ohio etc. R. Co.*, 55 Ind. 369; *Dunn v. Grand Trunk R. Co.*, 58 Me. 187; *S. C.*, Thomp. on Car. 328; *Lake Shore etc. R. R. Co. v. Greenwood*, 79 Pa. St. 373. A passenger who has no notice of the rule by public advertisement or otherwise, and who has been in the habit of riding on the freight trains of the company without having the kind of ticket required, can not be expelled from such a train at a distance from any station for non-compliance with the rule: *Lake Shore etc. R. R. Co. v. Greenwood*, *supra*. And, generally, a passenger who has purchased a ticket, purporting on its face to entitle him to be carried on any regular train, can not be restricted to a special train by a rule of which he had no knowledge when he took passage on another train: *Maroney v. Old Colony etc. R. R. Co.*, 106 Mass. 153.

So a passenger who has no notice of any rule to the contrary, and has entered the caboose of a freight train and paid first-class fare, is entitled to the same protection from injury as if he were on a regular train: *Dunn v. Grand Trunk R. Co.*, *supra*. And, generally, railway companies which are in the habit of carrying passengers on their freight trains, either without any rule to the contrary or in violation of their rules, are liable for their safety, subject only to the usual hazards of travel by such trains: *Hazard v. Chicago etc. R. R. Co.*, 1 Biss. 503; *Houston etc. R. Co. v. Moore*, 49 Tex. 31. It is further to be noted that a rule requiring passengers on freight trains to provide themselves with tickets is not reasonable, unless opportunities for obtaining such tickets are afforded by having the ticket office open at a seasonable and convenient hour before the departure of trains: *Evans v. Memphis etc. R. R. Co.*, 56 Ala. 246; *St. Louis etc. R. R. Co. v. Myrtle*, 51 Ind. 566; *Indianapolis etc. R. R. Co. v. Kennedy*, 3 Am. and Eng. R. R. Cas. 467. If no such opportunity is afforded, a passenger who has not obtained a ticket is entitled, upon payment of the usual fare to the conductor, to ride upon such a train: *St. Louis etc. R. R. Co. v. Myrtle*, 51 Ind. 566.

RULE THAT PASSENGERS SHALL NOT RIDE IN BAGGAGE OR MAIL CARS OF ON the platform of a train is reasonable and valid, and if a passenger violates it, the company is not liable for any injury that may thereby happen to him, even if he has permission, tacit or otherwise, from the conductor to ride in the baggage car or other prohibited place; for the rule being for the protection of human life, the conductor can not waive it: *Pennsylvania R. R. Co. v. Langdon*, 92 Pa. St. 21. So a rule requiring passengers on a street car to enter and depart by the rear platform is reasonable, and if violated, even with the permission of the driver or conductor, the company is not liable: *Baltimore etc. R. R. Co. v. Wilkinson*, 30 Md. 224. So a rule that passengers on a street car shall not ride on the front platform is reasonable: *Wills v. Lynn etc. R. R. Co.*, 129 Mass. 351; S. C., 2 Am. and Eng. R. R. Cas. 27.

RULES LIMITING TIME IN WHICH TICKET IS TO BE USED AND AS TO "STOP-OVER" TICKETS.—A railway company may adopt a regulation requiring all tickets to be used on the day of their issuance or within a specified number of days thereafter, and the passenger not using his ticket within the limited time, without any fault or failure of the company, can not claim the right to ride on it afterwards: *Boston etc. R. R. Co. v. Proctor*, 1 Allen, 267; *Johnson v. Concord Railway*, 46 N. H. 213; *State v. Campbell*, 32 N. J. L. 309; *Barker v. Coffin*, 31 Barb. 556; *Elmore v. Sands*, 54 N. Y. 512; S. C., 13 Am. Rep. 617; *Hill v. Syracuse etc. R. R. Co.*, 63 N. Y. 101; *Auerbach v. New York etc. R. R. Co.*, 60 How. Pr. 382; *Shedd v. Troy etc. R. R. Co.*, 40 Vt. 88. So a party purchasing a commutation or mileage ticket or a "stop-over" ticket may be required to use it within a limited time, and if he fails within that time to ride the distance to which it entitles him, he can not use it afterwards: *Sherman v. Chicago etc. R. R. Co.*, 40 Iowa, 45; *Powell v. Pittsburg etc. R. R. Co.*, 25 Ohio St. 70; *Lillis v. St. Louis etc. R. Co.*, 64 Mo. 464; *Wentz v. Erie R. R. Co.*, 5 Thomp. & C. 556. Nor will the company be estopped from denying a holder of a mileage ticket the right to use it after the time has expired, merely by permitting him to ride once or twice afterwards: *Sherman v. Chicago etc. R. R. Co.*, 40 Iowa, 45. The reasonableness of a rule of this sort is apparent. It enables the company to provide requisite car-room for all holders of tickets who are entitled to ride within a particular period or upon a particular train. Such limitations are generally printed upon the ticket, and may then be said to constitute a part of the contract rather than a rule governing the rights of the party: *State v. Campbell*, 32 N. J. L. 309. It is said, however, that the ignorance of a passenger that his ticket is, by the regulations of the company, limited to a particular day and trip, makes no difference, because it is his duty to inform himself on that point: *Johnson v. Concord Railway*, 46 N. H. 213.

A ticket having printed on it, "Good for this day only," does not, it seems, entitle the holder to use it on any other day, though he is assured by the company's agent that it is good until taken up, if the agent has no authority to make an oral contract different from that expressed on the ticket: *Boice v. Hudson River R. R. Co.*, 61 Barb. 611. It is said in *Pier v. Finch*, 24 Id. 514, that an unmutated ticket, upon which is printed the limitation, "Good this trip only," is good on any day until the trip has been begun; but this case is doubted by Judge Redfield: 1 Redf. on Railw. 108, note. By a statute passed in 1871, in Maine, all railroad tickets issued to be used within the state are good for six years from their date: *Carpenter v. Grand Trunk R. Co.*, 72 Me. 388.

A rule requiring passengers holding tickets to go through to their journey's end without stopping, when they have once started, unless a "stop-over"

check or ticket is procured, or an indorsement is made on the ticket entitling the passenger to lie over, is reasonable and valid, and indeed is merely in affirmance of the contract of carriage which, without some stipulation to the contrary, is entire, and calls for a continuous trip: *Drew v. Central Pacific R. R. Co.*, 51 Cal. 425; *Stone v. Chicago etc. R. R. Co.*, 47 Iowa, 82; S. C., 29 Am. Rep. 458; *Cheney v. Boston etc. R. R. Co.*, 11 Metc. 121; *State v. Overton*, 24 N. J. L. 435; *Terry v. Flushing etc. R. R. Co.*, 13 Hun, 359; *Oil Creek etc. R. R. Co. v. Clark*, 72 Pa. St. 231; *Dietrich v. Pennsylvania etc. R. R. Co.*, 71 Id. 432; S. C., 10 Am. Rep. 711; *Breen v. Texas etc. R. R. Co.*, 50 Tex. 43. Nor can the passenger, after surrendering his ticket, transfer himself to a different train: *Cleveland etc. R. R. Co. v. Bartram*, 11 Ohio St. 457. Want of knowledge by a passenger of a rule requiring him to obtain a "stop-over" check, or to have his ticket indorsed, or to comply with other conditions to entitle him to lie over on his journey, makes no difference as to his rights, for it is his duty to inform himself concerning the company's regulations on that point: *Beebe v. Ayres*, 28 Barb. 275; *Dunphy v. Erie R. R. Co.*, 10 Jones & S. 128; *Cheney v. Boston etc. R. R. Co.*, 11 Metc. 121; *Dietrich v. Pennsylvania etc. R. R. Co.*, 71 Pa. St. 432; S. C., 10 Am. Rep. 711. If he stops over without complying with the rule, he may be compelled to pay fare again, or be expelled from the train when he undertakes to continue his journey: *Id.* So if a passenger voluntarily or negligently detaches a check entitling him to stop over, and fails to present it to the conductor of the second train, he may be required to pay fare or leave the train: *Hamilton v. New York etc. R. R. Co.*, 51 N. Y. 100. The fact that the passenger stops over by permission of the previous conductor, but without proper evidence of his right, does not vary the rule, if the conductor has no authority to vary the contract: *Petrie v. Pennsylvania R. R. Co.*, 42 N. J. L. 449. So where he stops over on an ordinary check marked "Good for this day and train only," though he is informed by a person in the ticket-office, at his place of stopping over, that the check is good until taken up: *McClure v. Philadelphia etc. R. R. Co.*, 34 Md. 532; S. C., 6 Am. Rep. 345. So where he applies for a stop-over check, and is given an ordinary trip check, which is rejected by the conductor of the second train, who demands fare, and ejects the passenger for non-payment, the company is held not to be liable for such ejection, though it is liable for the mistake or negligence of the first conductor: *Yorton v. Milwaukee etc. R. R. Co.*, 11 N. Y. 482. But see *Palmer v. Charlotte etc. R. R. Co.*, 3 S. C. 580; S. C., 16 Am. Rep. 750, holding a railway company liable for ejection under similar circumstances. So where a passenger purchased a ticket marked "Good for this day only," upon the representation of the agent that the conductor would give him a stop-over check, which the conductor refused to do, saying that the rule allowing him to give stop-over checks had been recently changed, but permitted the passenger to retain his ticket, stating that he might probably succeed in going through on that, and the passenger accordingly stopped over, and took passage next day on another train, but the conductor refused to accept the ticket, demanded fare, and ejected the passenger for non-payment, the company was held liable therefor: *Burnham v. Grand Trunk R. Co.*, 63 Me. 298; S. C., 18 Am. Rep. 220. Under the Maine statute of 1871, before referred to, passengers on trains within the state are permitted to stop over on ordinary tickets: *Carpenter v. Grand Trunk R. Co.*, 72 Me. 388.

RULE AS TO STOPPING TRAIN AT STATION TO WHICH TICKET RUNS.—Where a railway company affords reasonable means of carrying passengers to all stations on its road, it may no doubt adopt rules providing that particular trains

shall stop only at certain stations, and a passenger having a ticket to a station not on the time-table can not require the conductor to stop there: *Chicago etc. R. R. Co. v. Randolph*, 53 Ill. 510; *Fink v. Albany etc. R. R. Co.*, 4 Lans. 147; *Dietrich v. Pennsylvania etc. R. R. Co.*, 71 Pa. St. 492; S. C., 10 Am. Rep. 711; *Lake Shore etc. R. R. Co. v. Pierce*, 3 Am. and Eng. R. R. Cas. 340. The passenger must inform himself before starting as to where the train stops: *Chicago etc. R. R. Co. v. Randolph*, 53 Ill. 510; *Pittsburgh etc. R. R. Co. v. Nuzum*, 50 Ind. 141; S. C., 60 Id. 533; *Ohio etc. R. R. Co. v. Appleton*, 52 Id. 540. But the train must stop at the station to which the ticket runs, and at which it is in the habit of stopping, if the conductor is seasonably informed of the passenger's desire to stop there, or the company will be liable on its contract: *Chicago etc. R. R. Co. v. Fisher*, 66 Ill. 152. It is said also in *Pittsburgh etc. R. R. Co. v. Nuzum*, 50 Ind. 141, that if a passenger purchases a ticket expressly for a particular train and is informed by the company that it stops at the station to which he desires to go, it must stop there or the company will be liable; but in the same case, in 60 Id. 533, it is held that the company is not bound by a statement of the agent that the train will stop at the station for which the ticket is purchased if it is not a regular station. The correct doctrine no doubt is, that the passenger has a right to rely on information given on that point by the agent from whom he purchases his ticket; but if informed by the conductor before reaching the station that the train does not stop there and that he must get off at an intermediate station, or pay fare to a station beyond, he must quit the train when requested and go for breach of contract, and can not remain till ejected and claim damages for that: *Lake Shore etc. R. R. Co. v. Pierce*, 3 Am. and Eng. R. R. Cas. 340 (Wis.) The company is held not to be bound by an agreement of the conductor to stop at a particular station not on the time-table: *Ohio etc. R. R. Co. v. Hatton*, 60 Ind. 12. But in *Western R. R. Co. v. Young*, 51 Ga. 489 that a conductor agreeing to put a passenger off at a station beyond the terminal point of his ticket must do so, though he may require fare to be paid to that point, and that if the train begins to slow up and the passenger prepares to get off but is thrown off the platform and injured by a sudden starting of the train before it has entirely stopped, the company is liable.

RULE PROVIDING SEPARATE CAR FOR LADIES and their escorts is certainly reasonable where the travel on the road is so great as to require it: *Bass v. Chicago etc. R. R. Co.*, 36 Wis. 450; S. C., 17 Am. Rep. 495; Thomp. on Car. 311; S. C., 42 Wis. 654; *Peck v. New York etc. R. R. Co.*, 70 N. Y. 587; *Chicago etc. R. R. Co.*, 55 Ill. 185; *Marquette v. Chicago etc. R. R. Co.*, 33 Iowa, 562. And other passengers may be excluded from such car if they can be provided with seats elsewhere: Id. But the rule must be reasonably enforced, and where a passenger unable to obtain a seat elsewhere except in the smoking-car, quietly enters the ladies' car and is rudely ejected, it is a breach of the contract: *Bass v. Chicago etc. R. R. Co.*, *supra*.

RULES PROHIBITING DISORDERLY CONDUCT on the cars and excluding disorderly passengers are also unquestionably reasonable. Indeed, without any express rule on the subject, it is the right of a railway company to eject passengers guilty of riotous or disorderly conduct, or using profane or obscene language, or the like, to the annoyance of other passengers: *People v. Caryl*, 3 Park. Cr. 323; *Putnam v. Broadway etc. R. R. Co.*, 55 N. Y. 108; S. C., 14 Am. Rep. 190; *Chicago etc. R. R. Co. v. Griffin*, 68 Ill. 499; *New Orleans etc. R. R. Co. v. Burke*, 53 Miss. 200; *West Chester etc. R. R. Co. v. Miles*, 55 Pa. St. 209; *Pittsburg etc. R. R. Co. v. Pillow*, 76 Id. 510. It is not only the right of the company to eject such passengers, but it is its duty to other passengers,

and upon its failure to do so a passenger injured by misconduct of other passengers has a right of action against the company: *Holly v. Atlanta St. R. R. Co.*, 61 Ga. 215; *Putnam v. Broadway etc. R. R. Co.*, 55 N. Y. 108; S. C., 14 Am. Rep. 190; *New Orleans etc. R. R. Co. v. Broadway*, 53 Miss. 200. So the company may and should expel passengers who are so grossly intoxicated as to make their conduct offensive to other passengers: *Vinton v. Middlesex R. R. Co.*, 11 Allen, 304; S. C., Thomp. on Car. 6; *Murphy v. Union R. Co.*, 118 Mass. 223; *Hendricks v. Sixth Av. R. Co.*, 12 Jones & S. 8. But slight intoxication not seriously affecting the passenger's conduct is no ground of expulsion: *Pittsburg etc. R. R. Co. v. Vandyne*, 57 Ind. 576. An intoxicated person whose conduct is not offensive is entitled to ride, and whatever may be his conduct, if he is allowed to remain, he is entitled to the same protection from injury as other passengers; *Milliman v. New York etc. R. R. Co.*, 66 N. Y. 643. If the conductor puts off a passenger, supposing him to be drunk when he is not, and when he has been guilty of no impropriety, the company is liable: *Higgins v. Watervliet Turnpike Co.*, 46 Id. 23. But if the passenger supposed to be drunk is only sick, it is his duty to inform the conductor of the facts: *Lemont v. Washington etc. R. R. Co.*, 1 Am. and Eng. R. R. Cas. (D. C.) 263. Sick passengers on railway trains are entitled to extra care: *Pittsburg etc. R. R. Co. v. McClung*, 56 Pa. St. 294. But a sick passenger on a street car can not expect extra accommodations, and must conform to the rules. If he lies down on the seat or vomits in the car, against the remonstrances of the conductor, it seems that he may be expelled without making the company liable, especially if he does not disclose his real condition, and the conductor believes him to be drunk: *Lemont v. Washington etc. R. R. Co.*, 1 Am. and Eng. R. R. Cas. (D. C.) 263.

A railway company or other carrier may even, to a certain extent, inquire into the motives and habits of passengers and exclude them previous to any actual misconduct, where they are of such a character as to make it probable that they will misbehave: *Jencks v. Coleman*, 2 Sumn. 221, *per* Story, J.; *Stephen v. Smith*, 29 Vt. 160, *obiter*. Thus, a notorious gambler traveling on the train, for the purpose of plying his trade among the passengers, may be excluded, but his fare must be returned: *Thurston v. Union Pacific R. R. Co.*, 4 Dill. 321. So, a notorious courtesan, whose character is such as to afford reasonable ground to believe that her conduct will be offensive to other passengers, may be excluded from the ladies' car, but the mere fact of her notorious unchastity, if her conduct and demeanor are lady-like, and there is no reason to believe that she will misbehave, is not enough: *Brown v. Memphis etc. R. R. Co.*, 7 Fed. Rep. 51; S. C., 5 Id. 499; 1 Am. and Eng. R. R. Cas. 247. And in one case it is said, *obiter*, that a pickpocket who has paid his fare and is guilty of no impropriety, can not be ejected: *Coppin v. Braithwaite*, 8 Jur. 875.

DISCRIMINATION ON GROUND OF COLOR.—Certainly a railway company or other carrier can not discriminate against persons on the ground of race, color, religion, or the like, and refuse to admit them to its cars or other vehicles: *West Chester R. R. Co. v. Miles*, 55 Pa. St. 209. And it seems to us, that without any statute upon the subject, a common carrier of passengers is bound to afford substantially equal accommodations to all persons who pay equal fare, without regard to any social or race distinctions, or any other distinction not founded upon personal conduct. But a rule providing for the separation of white and colored passengers by seating them in different cars, or in different parts of the same car, is, in the absence of any statute to the contrary, undoubtedly reasonable, if it is for the accommodation of the passengers gen-

erally, and if, owing to a repugnance between the two races, a promiscuous seating of persons belonging to each is likely to provoke tumult or disorder, provided that the accommodations afforded to each are substantially equal: *Id.*; *Green v. City of Bridgeton*, 9 Cent. L. J. 206. In *Day v. Owen*, 5 Mich. 520; S. C., *Thomp. on Car.* 306, it was held that the reasonableness of a rule excluding colored passengers from the cabin of a steamboat was a mixed question of law and fact, and that if the rule was for the accommodation of all the passengers, it was reasonable and valid. A rule requiring colored passengers on a street car to occupy the front platform, and excluding them from the body of the car, was held reasonable in *Goines v. McCandless*, 4 Phila. 255. But as the accommodations in such a case are manifestly unequal, we can not believe the rule to be valid. On the contrary, it was held in *Chicago etc. R. Co. v. Williams*, 55 Ill. 185; S. C., 8 Am. Rep. 641, that a railway company could not exclude a colored woman from the ladies' car, and compel her to sit in a car occupied mostly by men, where there was no rule providing a separate car or part thereof equally comfortable for colored persons. And in *Coger v. North Western etc. Co.*, 37 Iowa, 145, a regulation requiring colored passengers on a steamboat to take their meals on the guard of the boat, was pronounced unreasonable and void. There is now a statute in Pennsylvania prohibiting the exclusion of any passenger from any car or part thereof, on the ground of race or color; but it is a question for the jury, under this statute, whether in any particular case the exclusion is on the ground of color: *Central R. R. Co. v. Green*, 86 Pa. St. 421. A state law prohibiting steamboat companies on the Mississippi from excluding colored passengers from their cabins is unconstitutional, because it is in restraint of interstate commerce: *Hall v. De Cuir*, 95 U. S. 485. On the other hand, it is held that the civil rights bill of March 1, 1875, does not prevent railroad companies within a state from requiring colored passengers to occupy a separate car: *Oully v. Baltimore etc. R. R. Co.*, 1 Hughes, 536.

DISCRIMINATION BETWEEN FARE PAID ON TRAIN AND FARE PAID AT TICKET OFFICE.—A rule requiring passengers to purchase tickets before starting, or to pay a reasonable sum in addition to the rate for tickets if the fare is paid on the train, is reasonable and valid, because it tends to confine the collection of money for fares to the proper accounting officers of the company, and to prevent frauds by conductors, etc., and a passenger refusing to pay train fare may be ejected: *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 460; S. C., *Thomp. on Car.* 319; *St. Louis etc. R. R. Co. v. South*, 43 Ill. 176; *Indianapolis etc. R. R. Co. v. Rinard*, 46 Ind. 293; *Toledo etc. R. R. Co. v. Wright*, 68 Id. 586; S. C., 34 Am. Rep. 277; *Jeffersonville etc. R. R. Co.*, 28 Ind. 1; *Bland v. Southern Pacific R. R. Co.*, 55 Cal. 570; S. C., 36 Am. Rep. 50; *State v. Chovin*, 7 Iowa, 204; *Du Laurans v. First Division etc. R. R. Co.*, 15 Minn. 49; S. C., 2 Am. Rep. 102; *Hilliard v. Gould*, 34 N. H. 230; *Stephen v. Smith*, 29 Vt. 160. But a rule requiring a passenger not provided with a ticket, or failing to show it, to pay fare from the station from which the train originally started, without reference to the distance which the passenger has actually traveled, is unequal, unreasonable, and void: *Saunders v. South Eastern R. Co.*, L. R., 5 Q. B. Div. 456; S. C., 29 Moak's Eng. Rep. 384; 23 Alb. L. J. 10; *London etc. Ry. Co. v. Watson*, L. R., 3 C. P. Div. 429; S. C., 30 Moak's Eng. Rep. 277. And the more reasonable doctrine is, that to entitle a railway company to charge a larger fare than the regular ticket rate, where fare is paid on the train, it must afford the passenger an opportunity for purchasing a ticket by keeping the ticket office open a reasonable time before the departure of trains: *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 460; S. C., *Thomp. on Car.* 319; *St.*

Louis etc. R. R. Co. v. South, 43 Ill. 176; *Illinois etc. R. R. Co. v. Johnson*, 67 Id. 312; *Illinois etc. R. R. Co. v. Cunningham*, Id. 316; *Jeffersonville etc. R. R. Co. v. Rogers*, 28 Ind. 1; S. C., 38 Id. 116; S. C., 10 Am. Rep. 103; *State v. Chovin*, 7 Iowa, 204; *Du Laurans v. First Division etc. R. R. Co.*, 15 Minn. 49; S. C., 2 Am. Rep. 102. But in some cases it is held that the company is not bound, unless there is a statute requiring it, to keep its ticket office open in order to be able to charge additional fare on the train, and that the closing of the office, or failure to furnish a ticket, is a withdrawal of the offer to carry at the ticket rate: *Crocker v. New London etc. R. R. Co.*, 24 Conn. 249; *Nellis v. New York etc. R. R. Co.*, 30 N. Y. 505; *Bordeaux v. Erie R. Co.*, 8 Hun, 579. The effect of such a doctrine would obviously be to permit the company to discriminate between passengers, at will, by refusing tickets to some and furnishing them to others. Statutes have been enacted in some cases requiring the ticket-office to be kept open for an hour before the departure of each train: *Nellis v. New York etc. R. R. Co.*, *supra*. The reasonableness of the time for keeping the office open in the absence of any statute, is a question for the jury: *Du Laurans v. First Division etc. R. R. Co.*, 15 Minn. 49; S. C., 2 Am. Rep. 102. The office need not be kept open beyond the advertised time for the departure of trains where the train is delayed, it is held in *St. Louis etc. R. R. Co. v. South*, 43 Ill. 176. But the contrary is held in *Porter v. New York etc. R. Co.*, 34 Barb. 353.

If the ticket agent is unable to furnish a ticket on application and gives the passenger a certificate to that effect upon payment of the regular ticket rate, the certificate is evidence to the conductor of payment of fare: *St. Louis etc. R. R. Co. v. Dalby*, 19 Ill. 353. If through no fault of his own, but through the willfulness, mistake, or inadvertence of the agent, a passenger is not provided with a ticket, he may pay the train rate under protest and sue for the excess, or tender the ticket rate and hold the company liable for a refusal to carry him: *Jeffersonville etc. R. R. Co. v. Rogers*, 38 Ind. 116; S. C., 10 Am. Rep. 103. See also cases cited in a former part of this note, as to the effect of mistakes of the company's officers. The passenger must use reasonable diligence to procure a ticket, and merely looking in at the ticket-window and not seeing the agent or making any effort to ascertain whether he is in the office or to attract his attention is not enough: *Indianapolis etc. R. R. Co. v. Kennedy*, 3 Am. and Eng. R. R. Cas. 467. If the train rate exceeds the rate allowed by law, the passenger need tender only the ticket rate: *Smith v. Pittsburgh etc. R. R. Co.*, 23 Ohio St. 10. Where the ticket rate is tendered and the passenger refuses to pay the excess demanded, his money must be returned before he is ejected, or the company will be liable for the ejection: *Bland v. Southern Pacific R. R. Co.*, 55 Cal. 570; S. C., 36 Am. Rep. 50.

DISCRIMINATIONS IN FREIGHTS AND FARES GENERALLY.—It is a rule of the common law, that common carriers can not make unreasonable discriminations or give undue preferences between persons applying to them for carriage either of passengers or goods, either in granting carriage to some and not to others, or in carrying for some for less rates than for others: *McDuffee v. Portland etc. R. R. Co.*, 52 N. H. 430; *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 460; *Indianapolis etc. R. R. Co. v. Rinard*, 48 Ind. 293; *Messenger v. Pennsylvania R. R. Co.*, 36 N. J. L. 407; *Hays v. Pennsylvania etc. Co.*, 12 Fed. Rep. 311. See also a valuable and timely article on this subject in 16 Am. L. Rev. 818 (November, 1882). But a railway company may, undoubtedly, make reasonable discriminations in its freights and fares: *McDuffee v. Portland etc. R. R. Co.*, 52 N. H. 451. No general rule can be laid down, however, as to what discriminations are reasonable and what are not: *Hays v. Pennsylvania*

etc. Co., 12 Fed. Rep. 311. Obviously a railway company can not, by a general rule or by a special agreement, sell passenger tickets to some persons and not to others: *Indianapolis etc. R. R. Co.*, 46 Ind. 293. Nor can it agree to carry more cheaply for one person than for another if the circumstances are the same: *Messenger v. Pennsylvania R. R. Co.*, 36 N. J. L. 407. A regulation or contract to carry goods for one express company and not for others, or to afford more favorable terms or facilities to one express company than to another, is unreasonable and void: *Texas Express Co. v. Texas etc. R. R. Co.*, 6 Fed. Rep. 426; *Southern Express Co. v. Memphis etc. R. Co.*, 8 Id. 799; S. C., 12 Rep. 193; S. C., 13 Cent. L. J. 68; *New England Express Co. v. Maine Central R. R. Co.*, 57 Me. 188; *McDuffee v. Portland etc. R. R. Co.*, 52 N. H. 430. But the case of *Merrihew v. Milwaukee etc. R. R. Co.*, 5 Am. L. Reg. 364, seems to be contrary to this. In that case it was held, that an expressman could be forbidden to carry express matter in his trunk on a passenger train, though the company had a contract with other parties permitting them to carry express matter on passenger trains. So it was held in *Barney v. Oyster Bay etc. Co.*, 67 N. Y. 301; S. C., 23 Am. Rep. 115; S. C., *sub nom. The D. R. Martin*, 11 Blatchf. 233, that a steamboat company could prohibit a person from carrying on business as an express agent on board its boat in competition with other parties to whom it had granted the privilege. So also it was held in *Jencks v. Coleman*, 2 Sumn. 221; S. C., Thomp. on Car. 11, that steamboat proprietors could exclude from their boat a passenger who was a soliciting agent of a certain stage line which was doing business in competition with another line with which the steamboat proprietors had a contract to carry passengers in connection with their boats, such agent having been in the habit of traveling on the boats to solicit passengers for the rival line, it being left to the jury to say whether the contract was reasonable and not entered into for the purpose of an oppressive monopoly, and whether the regulation excluding the rival agent was reasonable for the purpose of carrying out that contract.

A RAILWAY COMPANY CAN NOT ESTABLISH A RULE not to deliver grain in bulk to a particular elevator except on condition that it shall choose the consignee, because that is a discrimination contrary to its duty as a carrier: *Chicago etc. R. R. Co. v. People*, 56 Ill. 365. Nor can it discriminate against small shippers in favor of larger shippers of the same class of goods solely on the ground of the difference in quantity: *Hayes v. Pennsylvania etc. Co.*, 12 Fed. Rep. 309; an exceedingly valuable case, in which Baxter, C. J., discusses at length the whole subject of discriminations in freights. But if the larger shipper undertakes to furnish a certain amount of freight per year in fully loaded cars at the rate of a certain number of cars per week, the carrier may agree to carry for a lower rate than for smaller shippers, on the ground of difference in the cost and trouble of service: *Nicholson v. Great Western etc. R. Co.*, 4 Com. B. (N. S.) 366. Discrimination in favor of localities where there is competition in carriage, against others where there is no competition, there being no other ground of difference, is unreasonable: *Chicago etc. R. R. Co. v. People*, 67 Ill. 11. See also 16 Am. L. Rev. 834, 838. The question of the reasonableness of a rule requiring higher fare to an intermediate station where there was no competition than to a station beyond where there was competition was discussed in *Regina v. Frere*, 4 El. & Bl. 598; S. C., 29 Eng. L. & Eq. 143, but the court expressly abstained from deciding it, as the case went off on another point. A higher rate of fare, in proportion to distance, may however undoubtedly be charged to passengers to way stations than to through passengers: *State v. Overton*, 24 N. J. L. 435. So there may be a dis-

crimination between local freights and through freights: *Shipper v. Pennsylvania R. R. Co.*, 47 Pa. St. 338; *Hersh v. Northern Cent. R. Co.*, 74 Id. 181. The railway company may also classify freights and passengers and charge different rates for the different classes, if there are reasonable grounds for such discrimination in the difference of the cost of service, risk of carriage, or in the accommodations furnished, or the like, but the rates must be the same for all persons and goods of the same class: *Chicago etc. R. R. Co. v. Parks*, 18 Ill. 460; *Hays v. Pennsylvania etc. Co.*, 12 Fed. Rep. 310, per Baxter, C. J.; *Hersh v. Northern Central R. Co.*, 74 Pa. St. 181. And, generally, discriminations based on difference in the cost of service, volume of traffic, grade and curvature of line, etc., are reasonable: 16 Am. L. Rev. 838.

STILES v. WESTERN RAILROAD CO.

[8 METCALF, 44.]

DECLARATIONS OF AN AGENT ARE ADMISSIBLE AS AGAINST HIS PRINCIPAL, only when made in regard to a transaction then pending, in which the agent is acting within the scope of his authority.

ASSUMPT for certain powder. To prove their demand, the plaintiffs introduced in evidence, against the defendants' objections, certain declarations of the defendants' agent, made after the delivery of the powder. Plaintiffs had verdict.

R. A. Chapman and H. Morris, for the defendants.

W. G. Bates, for the plaintiffs.

By Court, **WILDE, J.** At the trial in the court of common pleas, the declarations of the defendants' agent were admitted, to prove that they had employed the plaintiffs to supply the powder for which they demand compensation in this action; and it is very clear that such declarations are not admissible in evidence. The declarations of an agent are admissible only when made in regard to a transaction then depending. Such declarations are considered as part of the *res gestæ*, and so binding on the principal. When an agent is acting within the scope of his authority, his declarations accompanying his acts are admissible, as they may qualify his acts; but his declarations as to other matters and transactions are merely hearsay testimony. Such was the evidence admitted in the present case. It ought not to have been admitted, and the exceptions must therefore be sustained: *Greenl. Ev.*, sec. 113; *Fairlie v. Hastings*, 10 Ves. 126; *Haven v. Brown*, 7 Greenl. 424 [22 Am. Dec. 209].

New trial granted.

DECLARATIONS OF AGENT, WHEN ADMISSIBLE IN EVIDENCE AGAINST PRINCIPAL: See, in general, *Roberts v. Burke*, 12 Am. Dec. 325, and note; *Davis v. Whitesides*, 25 Id. 138, and note. Declarations or admissions by an agent,

not made at the time of the transaction nor forming a part of the *res gesta*, but made after the contract has been consummated, or after the agency has ceased, are not evidence against the principal: *Roberts v. Burks*, 12 Id. 325; *State Bank v. Johnson*, Id. 645; *Thalhimer v. Brinckerhoff*, 21 Id. 155; *Haven v. Brown*, 22 Id. 208; *Hubbard v. Elmer*, Id. 590; *Davis v. Whitesides*, 25 Id. 138; *Stockton v. Demuth*, 32 Id. 735; *Franklin Bank v. P. D. & M. S. N. Co.*, 33 Id. 687. And see also to the same point: *Chicago etc. R. R. v. Lee*, 60 Ill. 503; *Tuttle v. Brown*, 4 Gray, 457; *Coit v. Howd*, 1 Id. 552; *Corbin v. Adams*, 6 Cush. 96; *Sumner v. McNeil*, 12 Meta. 521; all citing the principal case.

LAPHAM v. WHIPPLE.

[8 METCALF, 59.]

PROVISION OF THE STATUTE OF FRAUDS, PROVIDING THAT NO ACTION SHALL BE BROUGHT upon any agreement that is not to be performed within one year, unless the same or a memorandum thereof is in writing, signed by the party to be charged, extends only to agreements which, by the express stipulation of the parties, are not to be performed within such time, and not to agreements which may probably not be performed within a year.

AGREEMENT OF A VENDOR, UPON THE SALE OF A PATENT RIGHT, to repay the consideration, if the vendee did not, within three years, realize a certain amount out of the profits of such patent right, can not be performed within a year from the time it was made, and is within the provisions of the statute of frauds requiring such agreements to be in writing.

ASSUMPSIT. The facts appear in the opinion.

Barton and Chapin, for the defendant.

Washburn, for the plaintiff.

By Court, WILDE, J. This case turns on the construction of the contract on which the plaintiff's claim is founded, which raises the question, whether it is not within the fifth clause of the first section of the statute of frauds, R. S., c. 74, which provides that no action shall be brought upon any agreement that is not to be performed within one year from the making thereof, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized. It is objected by the defendant's counsel, that the parol evidence is inadmissible to prove the agreement alleged in the declaration, as it had a tendency to affect and control the written contract of sale therein referred to. But we think this objection is not well founded. We consider the contract of sale as an executed contract by the payment of the purchase money.

And even if the verbal agreement were the consideration of the written contract, it was not required to be expressed in writing, but may be proved, by virtue of the revised statutes, c. 74, sec. 2, by any other legal evidence. The parol agreement is a separate contract, and may undoubtedly be proved by oral testimony.

The only question to be considered is, therefore, whether the agreement of the parties is within the statute of frauds; and that question depends, as before remarked, on the construction of the agreement. It has been long settled that the said fifth clause of the first section of the statute has no reference to promises which may probably not be performed within a year, however strong the probability may be. It extends only to agreements, which by the express stipulations of the parties are not to be performed within a year: as an agreement or promise to pay a sum of money on the arrival of a ship; or on a party's marriage; or to leave a sum of money by will; or to pay to a party an annuity; or any other promise depending on a contingency, which by any possibility may be performed within a year from the making thereof. In all such cases the statute does not require the agreement to be in writing: 2 Steph. N. P. 1976-1978; *Roberts v. Rockbottom Co.*, 7 Metc. 46. In the present case, the defendant's promise was to repay the plaintiff one thousand dollars which he had paid the defendant for the purchase of a share in a certain patent right, if the plaintiff did not, within three years from the date of the conveyance, realize the sum of one thousand dollars out of the profits arising from the share of said patent right so conveyed to him.

The plaintiff's counsel contends that this agreement might have been performed within a year, as the plaintiff might have realized the sum of one thousand dollars, within that time, from his share of the patent right, and that this would have been a performance, within the meaning of the contract. But we are of opinion that the true meaning of the contract is, that the plaintiff should have the whole term of three years, to ascertain what profits could be made from his share of the patent right; and that the performance of the contract was to be deferred until the expiration of that time. If then the plaintiff had realized, within the first year, one thousand dollars profits, which had been reduced below that sum during the two following years, the defendant would be liable for the non-performance of the contract. The realizing of the one thousand dollars from the profits was the contingency on which the defendant

might be discharged from his liability; but the payment of the money was to be the performance of the contract. And it is clear that the defendant would not be liable to an action for the non-performance, until the expiration of the three years. To support the action, the plaintiff must prove the contract; and the object of this clause of the statute was to prevent the proof of verbal agreements, when from the lapse of time the witnesses might not recollect the precise terms of the agreement. We think, therefore, that the defendant's contract, by the terms of it, was not to be performed within a year from the time it was made, and is within the true meaning of the statute.

Verdict set aside, and a new trial granted.

PROVISION OF THE STATUTE OF FRAUDS REQUIRING all contracts, which by their terms are not to be performed in one year, to be in writing, construed in *Moore v. Fox*, 6 Am. Dec. 338; *Lammott v. Gist*, 18 Id. 295; *Peters v. Westborough*, 31 Id. 142; *Linscott v. McIntire*, 33 Id. 602; *Lockwood v. Barnes*, 38 Id. 620, and note.

THE PRINCIPAL CASE IS CITED, to the points that an agreement which can not be performed within a year, according to its terms, is within the statute of frauds, although the consideration of it may be performed within the year, or has been actually performed, in *Frery v. Sterling*, 99 Mass. 462; that the special object of this clause of the statute was to prevent the proof of verbal agreements, when, from the lapse of time, witnesses might not be able to recollect their precise terms, in *Marcy v. Marcy*, 9 Allen, 13; that an agreement not to engage in the livery stable business was not within the statute, in *Lyon v. King*, 11 Metc. 412; and in *Holden v. Parker*, 110 Mass. 325, and *Page v. Sheffield*, 2 Curt. 378, to illustrate the occasions upon which parol evidence to explain a written contract is admissible.

HOUGHTON v. MANUFACTURERS' MUT. FIRE INS. CO.

[8 METCALF, 114.]

REPRESENTATIONS MADE BY AN ASSURED, IN HIS APPLICATION FOR A POLICY of insurance, which provides for the avoidance of the policy if such representations are false or insufficient, should be considered as part of the contract of insurance, to the same effect as if they were recited and set forth at large in the policy.

REPRESENTATIONS MADE IN AN APPLICATION FOR INSURANCE, IN GOOD FAITH, and without intent to deceive, are sufficient, if they are substantially true and correct as to existing circumstances, and are substantially complied with, so far as they are executory and regard the future; and if, subject to the above qualifications, the representations, in any particular material to the risk, do not contain a just, full, and true exposition, the company is not bound.

KNOWLEDGE BY AN APPLICANT, THAT CERTAIN REPRESENTATIONS MADE by him were false, is a question of fact for the jury.

PROVISION OF A POLICY, REQUIRING THAT IF THE CIRCUMSTANCES AFFECTING THE RISK shall be altered by the assured, so as to increase the risk, without the consent of the underwriters, the policy shall be void, binds the assured, not only not to make any alteration in the use of the property, which will increase the risk, but also from the discontinuance of any precaution, represented in the application to be adopted with a view to diminish the risk, and a failure to substantially comply with such provision will release the underwriters.

REPRESENTATIONS ARE TO BE CONSTRUED WITH REFERENCE to the requirements of the underwriters, and a mere literal conformity therewith is not necessarily sufficient.

REPRESENTATION BY AN ASSURED, THAT THE PROPERTY IS EXAMINED thirty minutes after work, necessitates an examination after extra, as well as after ordinary, working hours.

TIME THAT WORK CEASES IS A QUESTION OF FACT for the jury.

ASSUMPT on a policy of insurance against fire. It was admitted that the property was destroyed by fire, to the value stated in the policy, and that a large part of such property consisted of wool, partly manufactured, stored in the upper loft of one of the buildings. The policy provided, that "if the representations made [in the application for insurance] do not contain a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, so far as the same are known to the said applicants, and are material to the risk; or if the situation or circumstances affecting the risk thereupon shall be altered or changed by or with the advice, agency, or consent of the assured, or their agent, so as to increase the risk thereupon, without the consent of this company, this policy shall be void." The representations referred to were contained in answers to certain written questions, annexed to the policy, at the end of which the following notice was printed: "It is expected that the answers to the foregoing questions will meet the requirements of this office, which are [among others], that a cask of water, and buckets, will be kept in each story," and "that an examination will be had, say thirty minutes, after work." In answer to the questions: 1. What provisions are made for extinguishing fire? 2. What watch is kept in the building? And 3. During what hours is the factory worked? the assured answered: 1. That water-casks are placed in each room, and a force-pump conveys water into the second and third stories; 2. The mill is examined thirty minutes after work; and 3. From five o'clock A. M. to half-past eight o'clock P. M., and that sometimes extra work is done at night. Upon the trial, the defendants introduced evidence tending to show that no examination

of the building was made after work, on the night of the fire, and that no water-casks were kept in the fourth story. Plaintiffs were nonsuited.

O. Allen and Washburn, for the plaintiffs.

Newton, for the defendants.

By Court, SHAW, C. J. The contract of insurance against fire, as used and practiced by the mutual insurance companies in this commonwealth, depending upon the operation and effect of the act of incorporation and the by-laws, and the policy and written representations in each particular case, is somewhat new and peculiar; and the rules applicable to it have not been very fully and definitely settled by judicial decisions. For this reason, as well as on account of its importance to the parties, in point of amount, it is necessary to consider the present case with care. A nonsuit was ordered at the trial, subject to the opinion of the court upon various questions of law, which it was supposed would embrace the whole merits of the case. The court being of opinion, that in one particular the questions, decided as questions of law, should have been left to the jury, on the evidence, as questions of fact, the nonsuit is to be set aside and a new trial ordered. Upon several questions of law discussed at the argument, the court have come to an opinion, which it may be proper and convenient to the parties to state, in order to regulate the course of inquiry on another trial.

1. The court are of opinion that the policy, by the manner in which it refers, in terms, to the application and representations, does legally adopt and embody them as part of the contract, to the same effect as if they were recited and set forth at large in the policy.

2. That the application and the various answers contained in it, being termed "representations" in the policy, are rather to be regarded as having the legal effect of representations than of warranties, as understood in the law of marine insurance, though partaking in some measure of the character of both. They are like representations, in requiring that the facts stated shall be substantially true and correct, and, so far as they are executory, that they shall be substantially complied with; but not like warranties, in requiring an exact and literal compliance. It is enough, therefore, if these statements, relied on as the basis of the contract, are made in good faith and without intent to deceive; that they are substantially true and correct as to existing

circumstances, and substantially complied with, so far as they are executory and regard the future.

3. With the qualification above mentioned, the fact, that the representations made in the application do contain a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, so far as the same are known to the applicants, and are material to the risk, is a condition precedent to the liability of the defendants; and if, in any particular material to the risk, they do not contain such just, full, and true exposition, the company are not bound.

4. The proviso in the policy, that it shall be void, if the application does not contain a just, full, and true exposition of all the facts, has this limitation: "so far as the same are known to the applicants." At the trial, it was stated, as a conclusion of law, that if the applicants and assured were owners of the estate, they must be presumed to know certain facts respecting it. The court are of opinion that this was erroneous, and that the question whether the facts, if misrepresented, were known to the applicants, was a question of fact, to be left to the jury upon the evidence. The considerations referred to, as founding a legal conclusion of knowledge, are all fit and proper to be submitted to a jury; such as, that the assured and applicant is himself the owner of the property, and may be presumed to be acquainted with its condition; that the matter relates to things open and visible, things capable of distinct knowledge and not depending upon estimate, opinion, or mere probability; things in respect to which an owner is bound in honesty and good faith to know, takes upon himself to know, and usually does know; these, and all other pertinent evidence bearing on the question, are to be left to the jury, with directions that if they are satisfied from all the evidence, and can reasonably infer, that the assured did know the fact as it really existed, in regard to which misrepresentation is imputed, they are to find that he did know it; otherwise, not.

5. There is another clause in the policy, to which the attention of the court was drawn at the argument, which is this: "If the situation or circumstances, affecting the risk upon the property insured, shall be altered or changed, by or with the advice, agency, or consent of the assured or their agent, so as to increase the risk thereupon, without the consent of the company, the policy shall be void." The court are of opinion, that this was a stipulation and condition, without a substantive compliance

with which, the company, from the time of its happening, would cease to be bound by the contract. This provision binds the assured, not only not to make any alteration or change in the structure or use of the property, which will increase the risk, but prohibits them from introducing any practice, custom, or mode of conducting their business, which would materially increase the risk, and also from the discontinuance of any precaution, represented in the application to be adopted and practiced with a view to diminish the risk. The clause in question, as well as the preceding clause, refers to the application and the representations contained in it. Taking this clause with the representations, we think the legal effect is, that so far as these representations set forth certain usages and practices observed at the factory, as to the mode of conducting their business, and as to precautions taken to guard against fire, it is not only an affirmation that the facts are true at the time, but in effect a stipulation, that as far as the assured, and all those intrusted by them with the care and management of the property are concerned, such modes of conducting the business shall be substantially observed, and such precautions substantially continue to be taken, during the continuance of the policy.

By a substantial compliance, we mean the adoption of precautions, if not exactly those stated in the application, precautions intended to accomplish the same purpose, and which may be reasonably considered equally or more efficacious. For instance; when it is stated that ashes are taken up in iron hods, it would be a substantial compliance, if brass or copper were substituted. So, when it is represented that casks of water, with buckets, are kept in each story, if a reservoir were placed above, with pipes to convey water to each story, and found by skillful and experienced persons to be equally efficacious, it would be a substantial compliance.

6. But in construing these representations, both as to existing facts, and as to future precautions to be taken, a mere literal conformity and compliance would not be sufficient. Good faith, as well as the terms of the contract, requires that it shall be a full and just, as well as true exposition. These answers are to be construed in reference to the requirements of the office, and specified on the back of the application, and referred to in the questions; and they are to be so construed as to meet these requirements, and conform to them, when it can be done consistently with the terms of the answers. For instance; the answer to number thirteen, states that water casks are placed in each room. This an-

swer would be literally true, if a small vessel, having the shape and bearing the name of a cask, were so kept; but it would not be a full and just statement, nor a substantial compliance with the undertaking of the assured. That undertaking requires a substantial compliance, by keeping a cask of water of a size adapted to the required security, and holding a sufficient quantity to extinguish a sudden fire beginning to kindle in such story.

7. One other point was taken, respecting which an opinion was asked for and given at the trial. It related to the representation and the practice in respect to the examination of the factory. The representation was contained in the answer to the fourteenth question, as follows: "Is a watch kept constantly in the building? If no watch is constantly kept, state what is the arrangement respecting it." Ans. "No watch is kept in or about the buildings; but the mill is examined thirty minutes after work." This question referred to the requirements of the office, on the last page of the representation, amongst which is this, viz.: "that an examination will be had, say thirty minutes after work."

Question twenty-first was this: "During what hours is the factory worked?" The answer was: "From five o'clock A. M. to half past eight o'clock P. M. Sometimes extra work will be done in the night." Two questions were made at the trial: First. Whether this representation of the usual practice amounted to any condition or stipulation that it should be continued. It was ruled at the trial, and the whole court are now of opinion, that as this examination was manifestly intended as a substitute for a constant watch; as it was one which the assured had it in their power to make or cause to be made; as it was one of the precautions tending to secure the property against danger of fire, and tending to its safety; it was one which, as a general practice, the assured were bound to follow; although an occasional omission, owing to accident, or to the negligence of subordinate persons, servants, or workmen, not sanctioned nor permitted by the assured, or by their superintendent, manager, or agent, might not be a breach or non-compliance.

The second question under this clause regarded the time at which the examination was to be made. The question as understood at the trial, was this: whether, if the factory work was continued during extra hours in the night, that is, after half past eight P. M., the examination should be made at half an hour after the cessation of actual work, or half an hour after the time fixed in the twenty-first answer, as the usual hour of the cessa-

tion of work. On this question, considering the purpose of the examination, and considering that the object of the examiner would be, by the sense of sight or smell, to detect any latent fire or fire beginning to kindle, arising from sparks from the extinguished lamps, spontaneous combustion, friction of machinery, or otherwise; as this could be best accomplished after the mills were stopped, and the operation of the factory for the night had ceased, and the persons employed in it had left, I was of opinion that the examination must be made at thirty minutes after the cessation of the actual work of the factory, and that an examination thirty minutes after the time fixed by the twenty-first answer, as the usual time for closing work, if the factory did continue in operation, was not a substantial compliance with this stipulation. And the court are of opinion, that this direction, in the case supposed, was right, and that such is the correct construction of the contract. The assured had represented that the usual hour for the cessation of work was half past eight; yet, having represented that the factory would sometimes be worked during extra hours in the night, they had a right so to work, without impairing the contract. But if they thought fit, for any cause, to change the hours of work, so that it should continue to a later hour in the night, they must see that the examination be made at thirty minutes after the actual cessation of work.

8. But another question is now presented, which was not distinctly raised at the trial, and in regard to which, the evidence was not fully reported; and it is this: What is the cessation or termination of work; or, in other words, what is the meaning of thirty minutes after work within the meaning of the answer to the fourteenth question? As there is to be a new trial on other grounds, we think it proper to state the opinion of the court upon this point; although, through misapprehension of the counsel, or of the court, or otherwise, it was not raised at the trial, or presented on the report. The question as to what is a termination of work, within the meaning of this contract, is partly a question of law and partly a question of fact. The intentions of the parties, if they can be ascertained, are to govern; and these are to be learned from the language used, construed in connection with every part and clause in the contract, the subject-matter respecting which they are used, and the obvious purposes of each stipulation.

That the assured were bound to make an examination, at thirty minutes after work, is the construction of law on the

contract; what is the cessation of work, is a question of fact for the jury, depending upon the circumstances, and having in view the object and purpose of the stipulation, which was, to have an examination at such time as will conduce to the safety of the building. As some of the sources of danger are the continuance of fires and lights, and the friction of machinery, so long as the general work of the factory and operation of the machinery continues, a jury must find that the work had not then ceased, and could not be warranted in finding otherwise. If, on the contrary, the gate were shut, the machinery all stopped, the fires and lights extinguished, and the operatives generally retired, it could hardly be said that the work had not ceased, although one or two persons should remain to do something which should create no danger of fire. The fact to be looked to is not that the persons employed have all left, or that the lights are all extinguished, or that the machinery has wholly stopped, but the termination of the time during which the factory is worked; and this is an inference of fact, which may be influenced, more or less, by all these considerations.

Now between the full operation of the factory, and the entire cessation of work, extremes may be supposed on either hand, respecting which there could be no doubt. There may be various intermediate stages, in which it would be the duty of the jury to determine, upon the particular combination of circumstances, whether they constituted a cessation of the working of the factory, or not. If the general work of the factory has ceased, although a single machine may remain in operation for a special purpose, we think a jury should be instructed, that if such machine should cause no danger of fire, the examination should be made at thirty minutes after the cessation of the general work, and not after the stopping of the particular machine; and this the rather, because the contract stipulates but for one examination; and an examination after the cessation of the general work, being apparently most for the interest of both parties, may be presumed to be most conformable to their intentions. And so in the various cases, it will be for the jury to say, under the direction of the court, taking into view the purposes of the examination, and the nature of the work done, and the risk attending it, whether, within the meaning of this contract, the work of the factory, in the particular case, had terminated.

New trial ordered.

FALSE OR INACCURATE REPRESENTATIONS IN APPLICATION FOR INSURANCE, effect of on policy: See *Fowler v. Aetna Fire Ins. Co.*, 16 Am. Dec. 460, and

note; *Curry v. Commonwealth Ins. Co.*, 20 Id. 547; *Jefferson Ins. Co. v. Cotheal*, 22 Id. 567; *Curell v. Miss. Co.*, 29 Id. 439; *Farmers' Ins. Co. v. Snyder*, 30 Id. 118; *Wood v. Hartford Fire Ins. Co.*, 35 Id. 92.

ALTERATIONS OR REPAIRS IN PROPERTY INSURED AS AFFECTING RISK: See *Stetson v. Mass. Fire Ins. Co.*, 3 Am. Dec. 217; *Jolly v. Baltimore E. Soc.*, 18 Id. 288; *Curry v. Commonwealth Ins. Co.*, 20 Id. 547; *Rafferty v. New Brunswick Fire Ins. Co.*, 38 Id. 525.

THE PRINCIPAL CASE IS OTTED to the points that representations made in the application for insurance, so far as they are referred to in the insurance policy, become part thereof, in *Holmes v. Charlestown etc. Co.*, 10 Metc. 214; *Amesbury v. Bowditch etc. Ins. Co.*, 6 Gray, 603; *Eastern R. R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 426; *Clark v. Manf. Ins. Co.*, 2 Woodb. & M. 481; 8 How. 246; that such representations are sufficient if substantially complied with, in *Underhill v. Agawam etc. Ins. Co.*, 6 Cush. 446; that if such representations are false in any material particulars the policy is vitiated, in *Eddy Street Iron Foundry v. Hampden Stock etc. Co.*, 1 Cliff. 306; *Nicoll v. American Ins. Co.*, 3 Woodb. & M. 535; that any material change in the risk avoids the policy, in *Clark v. Manf. Ins. Co.*, 2 Id. 489; and that where no intention appears to give such representations the force of warranties, they will not be so construed, in *Campbell v. New England etc. Co.*, 98 Mass. 391.

AUSTIN v. CHARLESTOWN FEMALE SEMINARY.

[8 METCALF, 196.]

JUDGMENT AGAINST AN INFANT IN AN ACTION OF PARTITION, for whom no guardian *ad litem* has been appointed, is not void, and can only be taken advantage of by such infant or his privies in blood, by writ of error.

JUDGMENT IN AN ACTION OF PARTITION IS NEITHER VOID NOR VOIDABLE from the fact that it includes a parcel of land to which the tenants in common had no title.

WRIT of entry. The opinion states the facts.

B. B. Curtis, for the demandant.

J. Dana, for the tenants.

By Court, WILDE, J. This is a writ of entry to recover the possession of five undivided sixth parts of the premises described in the demandant's count. The defense is, that the tenants are solely seized by virtue of a judgment of this court on a petition for partition, whereupon the demanded premises were set off to them in severalty. The principal objection, made at the trial of the cause, to the validity of this judgment was, that Ellen A. Preston, the wife of Royal Preston, one of the tenants in common, was under the age of twenty-one years when the judgment was rendered, and that no guardian was appointed for her, as the law requires. It was contended that for this cause the judgment was not merely erroneous, but absolutely void. But the

cases cited by the demandant's counsel do not sustain the doctrine contended for. The decision in *Gallatian v. Cunningham*, 8 Cow. 365, has no bearing upon it. The point decided in that case was, that the sale by the guardian of a minor, which was set up in that case, was void, or was voidable, and that its validity might be impeached. It is true, that some of the remarks of one of the learned judges who delivered opinions in that case, may seem to support the doctrine maintained by the demandant's counsel; but these remarks have no authority beyond the respect due to the *dicta* of a learned judge, in which, however, we can not concur, if they are to be understood as laying down the broad principle, that the judgment of a court, where the proceedings are not in all respects conformable to the requisitions of a statute, is void and may be treated as a nullity. We do not, however, understand the learned judge as maintaining any such principle. Such judgments are voidable by writ of error, but not void: Bac. Abr., Infancy and Age, I, 2; Co. Lit. 380 b. The question then is, whether the judgment for partition had been avoided before the conveyance from Preston and his wife to the demandant. Voidable acts by an infant or matters of record done or suffered by him, can be avoided by none but himself or his privies in blood, and not by privies in estate; and this right of avoidance is not assignable: Bac. Abr., Infancy and Age, I, 6; *Whittingham's Case*, 8 Co. 43.

It has been argued that the judgment was avoided by the entry on the land by the attorney of Preston and his wife; and *Perrot's Case*, 2 Vent. 30, is cited, in which it was held that a fine levied by a married woman, she being an infant, might be set aside upon motion, because "perhaps the husband would not suffer the bringing or proceeding a writ of error." But this reason does not apply to the present case, as the entry, on which the demandant's counsel relies as an act of avoidance was authorized by the husband. It can not therefore be presumed that he would not permit a writ of error to be brought for the same purpose. In *Holford v. Platt*, Cro. Jac. 464, it was decided by a majority of the court, that a recovery against an infant, by default, might, by the infant, be avoided, in another action, by plea. But the ground of the decision was, that he was not entitled to a writ of error. Haughton, J., dissented, being of opinion that he was entitled to a writ of error. In *Smith v. Rice*, 11 Mass. 507, the tenant relied on a partition made by order of the probate court, and the case was decided on the ground, that a writ of error did not lie to the probate court. These cases,

therefore, do not support the doctrine now contended for by the demandant's counsel, namely, that a party to an erroneous judgment may be allowed to impeach and avoid it by matters *in fact*; a doctrine clearly opposed by all the authorities: Co. Lit. 380 b; 1 Rol. Abr. 742; *Ailet v. Watless*, Style, 246. The doctrine laid down or recognized in the cases cited is, that a party to an erroneous judgment, who is not entitled to a writ of error to reverse it, may avoid it, on motion, or by plea, in a court of competent jurisdiction. So infants may avoid recognizances and statutes entered into by them, by *audita querela*: Bac. Abr., Infancy and Age, I, 7. But where a party is entitled to a writ of error to reverse an erroneous judgment, it can not be avoided in any other way.

But another decisive objection to the demandant's title is, that Preston and his wife had no right to avoid the judgment of partition. If, instead of entering on the premises, they had brought an action to recover possession, it could not have been maintained against the tenants. Preston and his wife were jointly seized in the right of the wife; but in law they are considered as one person, the wife being, as it were, merged in her husband. He had the right of possession and occupation, and to take the rents and profits to his own use. He had a freehold estate, which he might sell and dispose of, or it might be taken on execution as his property; and the purchaser or execution creditor would have a good title against the wife, during coverture, and against her heirs, if the husband should survive, he being tenant by the curtesy. Now it is clear that the partition is valid against the husband.

It was objected, that a parcel of land was included in the partition, to which the tenants in common had no title. But this did not render the partition void, nor indeed voidable. But if it were voidable, it could only be avoided by a writ of error. Preston, therefore, could not maintain an action to recover possession, either in his own name, or by joining with his wife. The judgment is a good bar against him; his right and title vested, by the partition, in the tenants, and they have a good title to the possession. Some other objections to the tenant's title were made at the trial, which were overruled, for reasons which are satisfactory; and in arguing the exceptions, they were not relied on by the demandant's counsel.

Judgment on the nonsuit.

v. *Gates*, 38 Id. 164, and note, citing prior cases in this series. In this last case it was decided that it was indispensable to the validity of a judgment against an infant that the record should show that he was served and made a party in some legal and effectual mode, or otherwise the judgment would be void.

The doctrine of the principal case, that a judgment against an infant defendant, even where no guardian *ad litem* has been appointed, is not void, but merely voidable, is sustained in *Trappall v. State Bank*, 18 Ark. 63; *Milne v. Van Buskirk*, 9 Iowa, 559; *Moomey v. Maas*, 22 Id. 385; *Sewell v. Roberts*, 45 Mass. 276; *McMurray v. McMurray*, 60 Barb. 124; *Martin v. Weyman*, 26 Tex. 468; and must be attacked by writ of error: *Chandler v. McKinney*, 6 Mich. 221. The principal case is also cited to the point that the recovery of a greater judgment than is prayed for does not vitiate the judgment, in *Walker v. Sleight*, 30 Iowa, 326, and *De Witt v. Harvey*, 4 Gray, 494.

WATSON v. PHOENIX BANK.

[8 MISCALF, 217.]

ALLOWANCE OF A CLAIM AGAINST AN INSOLVENT BANK by the receivers, is satisfactory proof thereof, without resort to the books of the bank.

WHETHER LEDGER OF THE BANK, PRODUCED BY THE BANK'S PRESIDENT, is *prima facie* evidence of the credits contained therein, *quære*.

DEMAND BY A DEPOSITOR, PRIOR TO BRINGING SUIT FOR HIS DEPOSIT, is unnecessary, where the bank has suspended payment, closed its doors, and refuses to admit its creditors.

DEPOSITOR IS NOT DEPRIVED OF HIS RIGHT OF ACTION, against an insolvent bank, for the amount of his deposit, from the fact that he has presented his claim to the bank receivers, they not having required of him to give up the evidence of his demand, nor agreed to pay him a dividend.

DEPOSITOR IS ENTITLED TO INTEREST ON THE BALANCE DUE HIM BY A BANK, from the commencement of his action, notwithstanding the bank is restrained from carrying on its business, and a receiver has taken charge of its property.

ASSUMPSIT to recover a bank deposit. After the institution of this action, the bank was enjoined from carrying on its business, and its property was placed in the hands of receivers. The further facts appear in the opinion.

W. J. Hubbard, for the defendants.

Buttrick, for the plaintiff.

By Court, HUBBARD, J. The plaintiff, in support of his claim, produced the ledger of the defendants, and offered the president of the bank as a witness to prove the entry to his credit in the book. The defendants objected to the introduction of this testimony, on the ground that it was not the best evidence which the nature of the case admitted, and because the entries therein

were not proved by the clerk by whom they were made; but the objection was overruled.

1. It was argued by the counsel for the defendants, that the bank book of the plaintiff, in which the deposit was entered, was better evidence of the amount due than the books of the bank, and ought to have been produced. The bank book, so called, is a small book in which the entries of deposits made by the depositor are entered by a clerk of the bank, and correspond with the entries in the bank books; and they are made for the convenience of the depositor, who keeps the book to regulate his checks upon the bank, that he may not overdraw his account. But the book does not prove itself, and the entries it contains furnish no better evidence of the plaintiff's claim than the entries in the books of the bank; when admitted, they are of equal weight. The question then arises, whether the president of the bank, who did not make the entries, was a competent witness to prove the charge.

If the book had been offered by the defendants, to sustain their defense to the suit, the entries must have been proved by the clerk who made them, or evidence offered of his handwriting, in case of his death or absence from the country. But, in the case at bar, the book is produced by the president of the bank, at the request of the plaintiff, and it is admitted to be the ledger of the bank. Now this court have held, that the books of a bank, are open to depositors, and that the bank is bound to produce them on all proper occasions. The officers of the bank having the charge of the books are to be so far considered as agent for both parties: *Union Bank v. Knapp*, 3 Pick. 108 [15 Am. Dec. 181]. Whether the book thus produced, and proved by the president to be the book of the bank, is *prima facie* evidence of the credits therein contained, to sustain the plaintiff's claim, we do not feel called upon to decide; because the other evidence which has been offered of the allowance of this claim against the bank by the receivers, and which was introduced by the defendants for another purpose, furnishes satisfactory proof of the plaintiff's demand, without a resort to the books of the bank; and the evidence, therefore, derived from that source becomes immaterial.

2. It is contended, that the plaintiff was bound to prove a demand before the commencement of the suit. The declaration consists of the common money counts, and the specification of the plaintiff's demand shows that it is for money deposited with the defendants. When money is deposited in a bank, to be

drawn at the pleasure of the depositor, the bank is not liable to an action without a previous demand. The request is parcel of the contract, and must be proved. The bank agrees to pay to the order of the depositor; but if it were liable to a suit without previous demand, it would be under the necessity of refusing all deposits, or of making special contracts in every case. The duties of the parties are reciprocal; the one to pay on demand, the other to make such demand before a right of action accrues. But where the bank has suspended payment, and closed its doors, and refuses to admit its creditors, there a demand would be unavailing, and the bank, by its acts, has waived the necessity of a demand: *Cooper v. Mowry*, 16 Mass. 7. It appears also that the plaintiff went to the defendant's banking house, for the purpose of obtaining the money deposited by him; but that he was purposely excluded by the person appointed by the president of the bank to prevent persons from entering the bank, in consequence of its suspension of payments. And this act we deem equivalent to a demand on the part of the plaintiff.

8. But it is further contended by the defendants, that the plaintiff, having proved his demand before the receivers of the bank, can not now maintain the present suit; and he likens it to the case of a creditor's bill, where injunctions are granted to restrain creditors from proceeding at law, when the suit is brought in behalf of all the creditors; and also to the case of a party who is pursuing his remedy in two courts at the same time, and is enjoined in equity from prosecuting his claim in more than one court: *Jackson v. Leaf*, 1 Jac. & W. 229, and 1 Story's Eq., sec. 549. And we are of opinion, that, where a party like the present plaintiff has a suit at law, in which he has made an attachment which is not dissolved by the subsequent proceedings of the bank commissioners, he is bound to make his election, and is not entitled to the benefit of both funds, to the exclusion of other creditors. But we are likewise of opinion, that he is not concluded as to this election by the mere proof of his debt before the receivers, they not having required of him to give up to them the evidence of his demand, nor agreed to pay him a dividend.

The case of *Morse v. City of Lowell*, 7 Metc. 152, presented a question somewhat analogous. There, the defendants, being judgment creditors of the plaintiff, proved their demand under the commission of bankruptcy, for the purpose of contesting his discharge; they being fiduciary creditors. But the court decid-

ing that he was entitled to his certificate, they filed a petition for leave to withdraw their claim, which was granted. The defendants then caused the plaintiff to be committed on execution; upon which he brought his action against them, for trespass and false imprisonment. But the court held, that having elected to withdraw their claim upon the estate of the plaintiff, in the hands of his assignee, and leave being granted them to do it, they had still the right to pursue their remedy at law. And so in the present case, we think the plaintiff had not proceeded so far as to prevent his making his election. He had not filed his evidence of debt; he had received no dividend; and the receivers had entered a caution not to pay him a dividend. There was then left to him the *locus penitentie*, and having now decided to pursue his remedy at law, he has a right to do it, notwithstanding his proceedings before the receivers.

4. We are also of opinion that the plaintiff is entitled to interest on the balance due to him, from the commencement of his action.

Exceptions overruled.

DEPOSITORS' RIGHT OF ACTION AGAINST BANK for amount of deposit: See *In re Franklin Bank*, 19 Am. Dec. 413, and note, in which this subject is fully considered. In *Brahm v. Adkins*, 77 Ill. 265, it was held, citing the principal case, that unless excused by circumstances, a demand by a depositor is indispensable to the maintenance of an action against the bank for a deposit.

RAMSDELL v. EDGARTON.

[8 METCALF, 227.]

SECRET AGREEMENT OF A DEBTOR, MADE AT THE TIME OF AN ASSIGNMENT for the benefit of his creditors, by which he promises to pay a certain creditor his demand in full, as an inducement to his joining in the assignment and in releasing the common debtor, is void, as being a coercion upon the debtor and a fraud upon the other creditors.

PAROL EVIDENCE IS ALWAYS ADMISSIBLE TO SHOW that an instrument was obtained by fraud or duress.

ASSUMPSIT. The declaration contained a count for money had and received, and a special count on an agreement by which the defendants promised to pay the plaintiff's ancestor his demand in full, provided there was a balance due him thereon after the disposition and division of his property by his assignees. It appeared that this agreement was given in consideration of the plaintiff's joining in an assignment for the benefit of the defendants' creditors. The further facts appear in the opinion.

B. Russell, for the plaintiff.

C. H. Warren, for the defendants.

By Court, SHAW, C. J. It is very clear, we think, that this action can not be maintained on the note of June 7, 1833, because it is barred by the statute of limitations, and probably by the release contained in the assignment. And it seems equally clear, that *assumpsit* for money had and received would not lie, on the agreement of July 2, 1834, because it was a promise upon a condition or contingency; and an action could be maintained on it, only by setting out the special promise, and averring the happening of the contingency. But as this would only go to the form of the action, we have considered it further.

It is extremely doubtful whether Edgerton had authority as a partner, to bind the defendants by the agreement of July, 1834; but it might require a more particular statement of facts, to decide whether the partnership still existed. But there is another point, which we think decisive. It is found that this memorandum, promising to pay the balance of the debt in full, as far as the assigned property should fall short, was made as an inducement to the plaintiff to sign the assignment, and that he objected to signing it till this was done. If the memorandum could be considered as made before signing the assignment, then the obligation created by it would have been discharged by the general release contained in the assignment. But the true way is, to consider them as made at the same time, and the one act as the inducement to the other. It is then precisely within the principle of *Case v. Gerrish*, 15 Pick. 49. It was a secret agreement, made at the time of the assignment, and repugnant to its terms. By the assignment the creditor professed to unite with other creditors in discharging the common debtor, on receiving an equal distribution of his property. This was wholly counteracted by the secret agreement. It was an unwarrantable coercion upon the debtor, and a fraud upon the other creditors, and so was void.

The cases cited for the plaintiff, where it has been held that an express promise to pay the balance of a debt discharged by an act of bankruptcy is a good foundation to support an action, have no application. They proceed on the ground that the debt thus discharged leaves a moral obligation, which is a good consideration for an express promise. The distinction is obvious. The discharge is past; and the conscious moral obligation is the real consideration for the express promise. Here the con-

sideration for the promise is, that the creditor will execute a nominal and formal release, which may influence others, but which is intended to be counteracted by the agreement, so as to operate as no discharge of the debt. There can be no doubt that the evidence of the extraneous agreement, made at the time of the execution of the contract, was admissible. It is true that parol evidence of what was done, at the execution of the assignment, would not be admissible to vary or alter its terms; but parol evidence is always admissible to show that an instrument was obtained by fraud or duress, and so to avoid it; and for this purpose it is admitted in the present case: *Greenl. Ev.*, sec. 284.

Judgment for the defendants.

PROMISSORY NOTE GIVEN TO A CREDITOR IN CONSIDERATION of his joining in an assignment for the benefit of creditors, is void: *Yeomans v. Chatterton*, 6 Am. Dec. 277; or in consideration of withdrawal of opposition to debtor's discharge: *Sharp v. Teese*, 17 Id. 479.

PAROL EVIDENCE TO PROVE FRAUD OR DURESS is always admissible: *Stackpole v. Arnold*, 6 Am. Dec. 150; *Christ v. Dissenbach*, 7 Id. 624; *Dwight v. Pomeroy*, 9 Id. 148; *Erwin v. Saunders*, 13 Id. 520; *McCurdy v. Breathitt*, 17 Id. 65.

THE PRINCIPAL CASE IS CITED as an authority to sustain the generally accepted doctrine that an independent and secret agreement with a creditor, to pay him a further amount in consideration of his joining in an assignment for the benefit of creditors, is void, in *Lothrop v. King*, 8 Cush. 383; *Phelps v. Thomas*, 6 Gray, 328; *Partridge v. Messer*, 14 Id. 181; *Howe v. Litchfield*, 3 Allen, 444; *Sternburg v. Bowman*, 103 Mass. 325; *Harvey v. Hunt*, 119 Id. 283; *Fay v. Fay*, 121 Id. 562.

MATHES v. ROBINSON.

[8 METCALF, 269.]

TIME BOOK OF A PLAINTIFF, KEPT IN TABULAR FORM, in which the days of the month are placed at the head of the column, and the name of the workman at the side, and at the end of each day a figure is placed, indicating that the person has worked the whole or a part of such day, verified by the plaintiff's oath, is admissible to prove the amount of his own labor, as well as that of his apprentice.

ACCOUNT BOOKS, VERIFIED BY OATH, ARE NOT SECONDARY EVIDENCE, not to render the same admissible is it necessary to show the loss of other evidence.

ASSUMPSIT for work and labor, to prove which the plaintiff, under objection, introduced his time book. The further facts appear in the opinion of the court.

Wentworth, for the defendant.

Knowles, for the plaintiff.

By Court, SHAW, C. J. So long as the rule of law is allowed to prevail, that the account books of a plaintiff, verified by his oath, may be admitted to prove charges for services done and goods sold, much must depend upon the appearance and character of the book offered as evidence, and the view taken of it by the judge who tries the cause. It is true that the question, whether a book is competent to go to the jury, is a question of law; but as the law has prescribed no mode in which a book shall be kept, to make it evidence, the question of competency must be determined by the appearance and character of the book, and all the circumstances of the case, indicating that it has been kept honestly, and with reasonable care and accuracy, or the reverse. In the present case, the court can perceive no conclusive objection to the admission of the book called a time book. It is a book kept in a tabular form, in which the days of the month are placed at the head of the column, and the name of the workman on the side; and at the end of each day, or near it, a figure is put down at the place of intersection, say 1, $\frac{1}{2}$, or $\frac{1}{4}$, indicating thereby, that the person has worked the whole or a fraction of that day. It can not be objected that the time is put down in figures, for that is the case in all modes; nor that it was not an original entry, because that fact must depend, as in other cases, on the oath of the party, to prove that it was made at or about the time it purports to be made, and by the proper party. It appears to us to be intelligible, and not more liable to fraudulent fabrication or alteration than entries kept in ledger form, which have been held to be good: *Faxon v. Hol-
tis*, 13 Mass. 427; *Rodman v. Hoop*, 1 Dall. 85.

The objection to the book, so far as it tended to prove services of the apprentice, because the apprentice might have been called as a witness, seems to us untenable, and founded on a mistaken view of the nature of this species of evidence. The use of one's own books, verified by his oath, is not secondary evidence, nor is it necessary to its admission first to show the loss of other evidence. It is original, but feeble and unsatisfactory evidence. When such evidence is offered, and it is apparent from the case that the party producing it could probably furnish better evidence, and he fails so to do, or to account for its absence, it must greatly diminish the credit due to the feeble evidence. But this is a consideration which goes to its credit, and not to its competency, and is for the jury, and not for the court: *Holmes v. Marden*, 12 Pick. 169.

Exceptions overruled.

BOOKS OF ACCOUNT, WHEN ADMISSIBLE IN EVIDENCE: See this subject fully discussed in note to *Union Bank v. Knapp*, 15 Am. Dec. 181.

THE PRINCIPAL CASE IS CITED, as illustrating the requirement of an account book to authorize its admission in evidence, in *Gibson v. Bailey*, 13 Metc. 537; *Tremain v. Edwards*, 7 Cush. 416; *Barker v. Haskell*, 9 Id. 221; *Mores v. Potter*, 4 Gray, 293.

SHERIDAN v. BEAN.

[8 MEECALF, 284.]

TRESPASS MAY BE MAINTAINED ON ACCOUNT OF DAMAGE committed by cattle agisted, either against the owner or the agister, although but one satisfaction can be obtained. The rule of the common law in this respect has not been changed by the revised statutes, c. 113, sec. 4.

TRESPASS *quare clausum fregit*. The facts appear in the opinion.

B. F. Butler, for the defendant.

Wentworth, for the plaintiff.

By Court, HUBBARD, J. This is an action of trespass, *quare clausum fregit*, and the only question submitted to the court is, whether it will lie against the owner of horses at agistment, which have strayed from the agister's field into the plaintiff's, and have done the damage complained of. It is contended that this action can not be maintained, either at common law or upon the statute, against the owner of the horses, under such circumstances, but only against the agister. And the argument urged is, that to constitute a trespass, there must be an invasion of the property or person of another, by one who is an actor without right, either willfully or negligently; and that in the present case, the act of sending the horses to be agisted was lawful, and that during the time they were agisted they were under the control and in the custody of the agister, and not of the defendant. But though it is true that the owner of land or of chattels can not maintain trespass against a wrong-doer, unless he is in possession of the land or the chattels at the time of the wrong done, yet it does not follow, as the converse of the rule, that the general owner may not be liable in an action for the injury done to another by a bailee or servant of the owner, though he is out of possession at the time of the injury. There are cases in which the party has an election whether to sue the owner of the chattel, or the agent or servant. And in regard to cattle, which, from their nature and the manner in which they are kept and employed, are peculiarly liable to trespass upon others, especial

care has been taken for the protection of the rights of parties upon whom such trespasses may be committed, by giving them a remedy, not only against owners, but a process *in rem*, against the cattle themselves, when taken damage feasant.

In the case of trespass committed by cattle agisted, which is the case at bar, it is laid down, by approved writers of former times, cited by the plaintiff's counsel, that the party injured has his election to sue either the owner or agister, though he can have but one satisfaction. Si mes avers sont en le gard de I. S., et durant cest temps font trespas al auter, il avera trespas vers moie ou I. S. a son election, mes il n'avera satisfaction d'ambideaux. 2 Rol. Abr. 546, cites 7 Hen. IV., 31 b. And this is confirmed by Comyns in his digest: Trespass, c. 1. See also 20 Vin. Abr., Trespass, B.

The defendant's counsel has cited a case from Clayton's reports, called *Bateman's Case*, as maintaining a contrary doctrine. But upon examining that case, it is found merely to affirm the position, that in case of agist cattle, the agister is liable for trespass committed by them, without touching the question of the liability of the owner also to an action. The principal case in Clayton is that of *Dawtry v. Huggins*, pp. 32, 33, in which it was ruled, that "if A. have the custody of the goods of B.; as here it was hogs put into the defendant's yard; if these do a trespass to the land of C. adjoining, A. shall be punished in trespass, and this though the owner's servant did wait upon them; and here it was proved the servant of A. did also wait on them, and did serve them, therefore they were in his special possession; and the like matter was ruled in the *Case of Stephen Bateman of Wakefield*, for agist cattle, if they do commit a trespass, the owner of the soil, where, etc., shall answer for that trespass." We consider, then, that the common law gave the plaintiff his election to pursue either the owner or agister, at his pleasure, or to seize the cattle damage feasant, intending to afford a threefold remedy for an injury so easily committed.

The other question which has been presented for consideration is, whether the statutes of this commonwealth have modified or altered the common law in this respect, at least so far as it regards the owners of agisted cattle. The language of the revised statutes, c. 113, sec. 4, is this: "When any person is injured in his land, by sheep, swine, horses, asses, mules, goats, or neat cattle, he may recover his damages, in an action of trespass against the owners of the beasts, or by distraining the beasts doing the damage, and proceeding therewith as hereinafter

directed; provided, that if the beasts shall have been lawfully on the adjoining lands, and shall have escaped therefrom, in consequence of the neglect of the person who has suffered the damage to maintain his part of the division fence, the owner of the beasts shall not be liable for such damage." And we are of opinion that the word "owner," in this section, is used in a popular sense, and is intended to apply to the person in whom is the general property of the animals enumerated, and embraces those also who are in possession under a special title, or by virtue of any lien. We view this section and the statute of 1834, c. 184, sec. 5, as merely a slight modification of section 3 of the statute of 1788, c. 65; and the provisions of that section are considered by Parsons, C. J., in his elaborate opinion in *Rust v. Low*, 6 Mass. 98, as merely an affirmance of the common law. If the revisers of our statutes had intended to restrain the operation of c. 113, sec. 4, to the general owner, and thus to have modified the common law, still such a construction would not avail the present defendant, who seeks to apply it to the agister of cattle.

While there is an apparent hardship in subjecting a person to the action of trespass, where the cause arises from the neglect of another, yet we can not overlook the necessity of the checks which are required to guard against this species of trespass, which is not only so easily committed, but is so difficult to prevent. And we think our ancestors intended to give an ample remedy, by subjecting the owner, the agent, or bailee, and the offending animals themselves, to making good the damages thus committed. Nor does the hardship appear so great, when we consider that the owner has his remedy against the person whom he employs, and if he does not obtain satisfaction for his loss, it is rather he who employed a negligent person that should suffer, than the man who is injured by such neglect. On the whole, we are of opinion that by the common law the present action is maintainable, and that the same right is affirmed by the statute.

Exceptions overruled.

COMMONWEALTH v. FULLER.

[8 METCALF, 313.]

CRIMES WHICH EXISTED PRIOR TO THE CONSTITUTION, and were offenses at common law, although they may be forbidden by the constitution of the United States, and authority to punish the commission of them is conferred upon the federal courts, may also be punished by the state courts,

unless the grant of power by the constitution is exclusive, or is made exclusive by act of congress.

STATE COURTS HAVE POWER TO PUNISH THE CRIME OF COUNTERFEITING the gold and silver coins of the United States, or which are made current by the laws thereof, or for uttering the same or bringing them into the United States with intent to utter them.

COUNTERFEITING. The facts appear in the opinion.

J. G. Abbott, for the defendant.

Huntington, district attorney, for the commonwealth.

By Court, HUBBARD, J. This indictment is founded upon section 15 of chapter 127 of the revised statutes, which declares that "every person, who shall counterfeit any gold or silver coin, current by law or usage within this state, and every person, who shall have in his possession, at the same time, ten or more pieces of false money or coin counterfeited in the similitude of any gold or silver coin current as aforesaid, knowing the same to be false and counterfeit, and with intent to utter or pass the same as true, shall be punished by imprisonment in the state prison for life, or for any term of years." It is admitted that Mexican dollars are made a part of the legal currency of the United States, by act of congress passed June 25, 1834: Stat. 1834, c. 71. The jury have found the defendant guilty of the offense charged in the indictment, and the case is brought before this court upon these exceptions: That the offense proved is one over which the courts of this commonwealth have no jurisdiction; but that the defendant is liable to be indicted and tried in the courts of the United States only: That the law of this commonwealth, giving its courts jurisdiction of the offense charged in the indictment, is repugnant to, and in conflict with, the constitution and laws of the United States. The case now presented, though it involves the question of state jurisdiction, does not require a minute review of the various decisions upon that branch of constitutional law, to enable us to arrive at a satisfactory conclusion, if different acts of congress, passed in relation to certain offenses punishable by the constitution, are to be received as expressing the law.

Before referring to those statutes, it may be remarked that, in respect to those subjects which are created by the constitution itself, or are enumerated as within its exclusive jurisdiction, it has not been doubted but that questions or cases growing out of those subjects are within the peculiar province of the courts of the United States to determine. On the other hand, the fact, that jurisdiction in certain cases is given by the constitution

does not in itself carry with it, by the mere force of the grant, an exclusive right to the exercise of such jurisdiction. But the character of such right, whether exclusive or concurrent, depends either on the nature of the subject, the express language of the constitution, or the manner in which it has been enforced by legislative action. In regard to crimes which existed prior to the constitution, and were the subject of state legislation, or were punishable as offenses at common law, and the prevention of which is essential to the peace and good order of the community, though such crimes are also forbidden by the constitution of the United States, and the authority to punish the commission of them is conferred by congress upon the federal courts; still, unless such grant of power is exclusive, by the terms of the constitution, or is made exclusive by acts of congress, the concurrent right of the state courts to try persons accused of such crimes is not necessarily taken away. This, as before observed, we think follows from the language of different acts of congress.

In the judiciary act of September 24, 1789, 1 U. S. L., Story's ed., 53, no such exclusive power is conferred by the ninth and eleventh sections, which declare in what cases the courts of the United States shall have exclusive jurisdiction; but the language of the eleventh section is this: "And shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct." On referring to the act of April 21, 1806, 2 U. S. L., Story's ed., 1032, which is made "for the punishment of counterfeiting the current coin of the United States, and for other purposes," after prescribing the punishment of the various offenses growing out of counterfeiting and uttering false money, the last section provides "that nothing in this act contained shall be construed to deprive the courts of the individual states of jurisdiction, under the laws of the several states, over offenses made punishable by this act." And in the act of March 3, 1825, 3 U. S. L., Story's ed., 1999, "more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," in which there are sundry enactments against the forging and uttering of counterfeit money, the same proviso is contained in the last section.

By the statute of 1789 already referred to, exclusive jurisdiction is not conferred on the United States courts, where the laws of the United States shall otherwise direct. The above-men-

tioned statutes of 1806 and 1825 give such other direction, and in them a concurrent jurisdiction is clearly recognized, in the state courts, over crimes of counterfeiting the gold and silver coins of the United States, or which are made current by the laws thereof, or for uttering the same, or bringing them into the United States with intent to utter them. If then the provisos contained in these statutes are constitutional, no sufficient reason can be given why a person, committing the offense charged in the present indictment, is not liable to be tried before the state courts as well as before those of the United States; nor why, if he is first arraigned before a state court having cognizance of the offense, such court may not proceed to trial, and to the rendition of a judgment which will be final and conclusive.

It is argued, however, that the proviso in the statute of 1825, extended only to state laws then in force; and a reference is made to the case of *United States v. Paul*, 6 Pet. 141. But that case decided simply that the third section of the statute of March 3, 1825, was to be limited to the laws of the several states in force at the time of its enactment. That section related to offenses committed in forts, dock-yards, etc., the site whereof is under the jurisdiction of the United States, and to the punishment of such offenses as were not specially provided for by any law of the United States; and it enacted that a person so convicted in a court of the United States should receive the same punishment as would be inflicted by the state court, if the same offense were committed in the body of such state. The reason of such a restriction is obvious; because the state laws were not in force in such places, so ceded to the United States; and it was a mode adopted to regulate the punishment of offenses not named, by a reference to state laws in which they were specified. But in regard to the proviso at the close of the statute, such a limited construction is not warranted by the terms used, nor by the intent expressed. It points, not to existing state laws, as prescribing a measure of punishment to be observed in rendering judgments in the United States courts, but to the rights of states to exercise such jurisdiction generally, in regard to the offenses mentioned in the statute.

It is contended also, that it is unconstitutional to subject a person to the operation of two distinct laws upon the same subject; and inflicting different pains and penalties. But I hold that the delinquent can not be tried and punished twice for the same offense, and that the supposed repugnancy between the

several laws does not, in fact, injuriously affect any individual. The man who commits the crimes runs the hazard, under which jurisdiction he may be subjected to punishment; and after violating the law, it comes with ill grace from him to complain of the penalty. If he were indeed liable to be punished twice for the same offense, he might well argue against oppression; and the existence of such liability would go far to prove the unconstitutionality of the law. But while the proviso in the act of congress remains unrepealed, the criminal can not be thus exposed; as the court which first exercises jurisdiction has the right to enforce it by trial and judgment, by the well-established principles of law relating to the jurisdiction of courts: See *Houston v. Moore*, 5 Wheat. 31. It is also said that the president of the United States has power to pardon offenses before conviction, while the governor of the commonwealth is restricted to cases after conviction. But the power of pardon is not a right upon which any criminal can insist; and the mode in which it may be exercised does not enter into the question of jurisdiction of state laws for the punishment of crimes, of which a party can legally avail himself as a ground of error.

The question arising in this case has been brought before other state courts, and differing decisions have been made. In Missouri, it was held that the court had no jurisdiction: *Mattison v. The State*, 3 Mo. 421. In Indiana it was decided, in a similar case, that the court had jurisdiction over the offense: *Chess v. The State*, 1 Blackf. 198. Like decisions have been made in South Carolina: *The State v. Antonio*, 3 Brev. 562; *The State v. Tutt*, 2 Bailey, 44 [21 Am. Dec. 508]. Other cases also have been cited to show that, where congress have legislated on a given subject, state laws on the same subject are unconstitutional and void: *Martin v. Hunter's Lessee*, 1 Wheat. 305; *Houston v. Moore*, 5 Id. 1; *United States v. Lathrop*, 17 Johns. 4. And in the late decisions on the rights of slaveholders, *Prigg's Case*, 16 Pet. 617, 618, one of the learned judges, in giving his opinion, says: "If congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it can not be that state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of congress, to prescribe additional regulations, and what they deem auxiliary provisions for the same purpose. In such case, the legislation of congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence

as to what it does not do is as expressive of what its intention is as the direct provisions made by it."

But without inquiry here how far this reasoning is free from objection, it is sufficient to say, in this case, that congress have neither by their words nor their silence manifested the intention of having either exclusively or actually regulated the whole subject of crimes, respecting the uttering of counterfeit money. On the other hand, feeling the ease and frequency with which such crimes are committed, and the difficulty of bringing criminals to punishment, they expressly recognize the right of the states to act upon the same subject, and to punish the same or similar offenses by their own laws. And Washington, J., in the case of *Houston v. Moore*, 5 Wheat. 27, in referring to the statute of April 21, 1806, says, "it is clear that, in the opinion of congress, this saving was necessary, in order to authorize the exercise of concurrent jurisdiction, by the state courts over those offenses." And he adds, shortly after, "but by these savings congress did provide that the jurisdiction of the federal courts, in the specified cases, should not be exclusive, and the concurrent jurisdiction of state courts was instantly restored, so far as, under state authority, it could be exercised by them." And this view is sustained by Chancellor Kent, in his commentaries: 1 Kent's Com., 1st ed., 374, 375; 5th ed., 399.

The statutes of this commonwealth, for the punishing of crimes against the currency, and for uttering counterfeit money knowing it to be false, were in existence before the formation of the constitution of the United States, and the same have been re-enacted, from time to time, with additions to reach evasions of the law not specifically provided against; and the same have been adopted as part of our revised code. But the learned revisers have expressed no doubt as to the constitutionality of these acts, or of the want of jurisdiction in our courts. Upon this view of the subject, we do not feel called upon to bring, nor consider ourselves warranted in bringing, our own statutes into doubt, or to pronounce against the constitutionality of the provisos of the United States statutes. The construction and legality of them may be determined by the highest tribunal, when any party, aggrieved by the decision of this or any other state court, sees fit to remove his case by writ of error into the supreme court of the United States, and there have such decision revised. But till such a revision takes place, and the state laws and those of congress are pronounced to be unconstitutional, we feel bound to enforce the statute of our own

commonwealth against the offense charged in the present indictment.

It was urged, by the learned district attorney, that the offense of having false money in possession with intent to utter the same, is not provided against by the statutes of the United States, and is in fact *casus omissus*; and we are strongly inclined to that opinion, and that the case might possibly be decided on the fact of such omission. But as our own judgment is not influenced by this alleged omission of the particular offense charged among those enumerated in the acts of congress, we do not enlarge on this view of the case, as presented by the counsel for the government. And for the same reason, we do not comment on the language of the constitution itself, art 1, sec. 15, whether it contemplated the punishment of the crime set forth in this indictment, under the provision "for the punishment of counterfeiting the securities and current coin of the United States."

Exceptions overruled.

STATE COURTS HAVE POWER TO PUNISH FOR THE OFFENSE OF COUNTERFEITING, notwithstanding such offense is punishable by the federal laws: *State v. Pitman*, 2 Am. Dec. 645; *State v. Tutt*, 21 Id. 508.

THE PRINCIPAL CASE IS CITED to the point that the state courts have no jurisdiction to punish the embezzlement of the funds of a national bank, as the statute of congress regulating such crimes has conferred exclusive jurisdiction upon the federal courts, in *Commonwealth v. Felton*, 101 Mass. 206. Compare *Commonwealth v. Tenney*, 97 Id. 57.

FINNEY v. BEDFORD COMMERCIAL INS. CO.

[8 METCALF, 348.]

POLICY OF INSURANCE, MADE IN THE NAME OF A PARTICULAR PERSON, who is the owner of a small proportion of the property insured, can not be made to cover the interest of others upon parol proof that the application for insurance was for such others, as well as for the party named, and that this was well known to the insurers, and that it was the intention of all the parties that the policy was to cover the interest of all the owners.

DECLARATION ON A POLICY OF INSURANCE, which joins as plaintiffs persons whose interests are not covered by the policy, may be amended by striking out the names of such parties.

ASSUMPSIT on a policy of insurance, which insured John S. Bates against loss of the bark *Volante*. The plaintiffs offered to prove that Bates was their agent for procuring the insurance; that he was but a small owner in the vessel; that the amount

insured for was in behalf of all the owners; that it was the intention of all the parties, at the time of insurance, to cover the interest of all the owners, and that all of such facts were known to the underwriters at the time of insurance. The evidence was excluded, and defendants had verdict.

Eddy and Coffin, for the plaintiffs.

Colby and Clifford, for the defendants.

By Court, DREW, J. The question here presented is, not as to the competency of John S. Bates to effect an insurance for the benefit of all his associates, who were interested in the property which was the subject of the insurance, but whether, upon the face of this policy, and the terms of this contract of insurance, the legal effect is not to restrict the insurance to the sole interest of Bates. It may at once be conceded, that it was competent for Bates to effect such insurance on the entire interest of all concerned, if either previously authorized by the co-owners, or if they elected to ratify his act, even after the loss of the property: *Finney v. Fairhaven Ins. Co.*, 5 Metc. 192 [38 Am. Dec. 397]. But the appropriate form of the policy in such cases is, "for himself and other owners," or "for whom it may concern," or other words indicating that the insurance is to embrace an interest beyond that of the party in whose name the policy is issued. Such words, or equivalent ones, being introduced into the policy, the rules of law then authorize extrinsic evidence as to the persons who are parties in interest, and who may enforce their claims upon such policy, though not particularly named therein.

But the real question here is, whether a policy, made in the name of a particular person, who is the owner of a small proportion in interest of the property insured, without any words indicating an intention to insure beyond his own interest, can be made effectual to cover the interest of others, upon parol proof that the application for insurance was for such others, as well as for the party named, and that this was well known to the insurers, and that it was the intention and understanding of all the parties, that the policy was to cover the interest of all the owners. The general rule excluding parol evidence, when offered to contradict or vary the terms of a written contract, seems to forbid it. When the parties have put their agreement into writing, and the terms of it are plain and direct, leaving no uncertainty as to the nature of it, we must treat it as the whole engagement of the parties; and this excludes all parol evidence

of conversations, or declarations of the intentions of the parties, tending to show another and different contract: *Stackpole v. Arnold*, 11 Mass. 31 [6 Am. Dec. 150]; Greenl. Ev., sec. 275. This principle, we apprehend, applies as well to contracts of insurance as to other agreements. Such seems to be the doctrine of the adjudicated cases. Thus, in *Pearson v. Lord*, 6 Mass. 84, Sewall, J., in delivering the opinion of the court, says: "The instrument itself is regarded as the best, and, for this purpose, must be understood to be the only evidence of the contract. No case can, I believe, be imagined, where the maxim, *expressio unius est exclusio alterius*, applies more emphatically than in the naming of the party assured in a policy of insurance." In *Graves v. Boston Marine Ins. Co.*, 2 Cranch, 419, it was held that a policy in the name of one part owner, with the words added, "as property may appear," without the clause stating the insurance to be for the benefit of all concerned, does not cover the interest of another joint owner; the words, "as property may appear," being considered as applicable to the property of the one in whose name the policy issued. Marshall, C. J., says: "The contract ought to have been so expressed as to show that the interest of some other than Graves was secured, if such was to be the effect of the instrument. A policy, though construed liberally, is still a special contract; and under no rule for proceedings on a special contract, could the interest of copartnership be given in evidence on an averment of individual interest, or the averment of the interest of a company be supported by a special contract relating in its terms to the interest of an individual." See also *Murray v. Columbian Ins. Co.*, 11 Johns. 302; *Turner v. Burrows*, 5 Wend. 541; *Finney v. Warren Ins. Co.*, 1 Metc. 18 [35 Am. Dec. 843].

The only case referred to by the plaintiff which seems, in any degree, to conflict with this view of the subject, is that of *De Vignier v. Swanson*, cited in a note to *Bell v. Gilson*, 1 Bos. & Pul. 346; where it seems to have been held that a policy of insurance, in the name of certain persons who procured it as agents, although they were not described as agents in the policy, was good and valid for the persons for whom it was effected. The question there raised, however, was merely whether the form of the policy was in accordance with the provisions of the statute of 28 Geo. III., c. 56, requiring the names of the consignors or consignees of the property to be insured, or the names of the persons residing in Great Britain who shall receive the order or effect such policy, or the persons who shall give the

order or direction to the agent employed to effect such policy, to be inserted in such policy; and it was held to be a sufficient compliance with the statute to insert the names of the agents, without stating them to be agents.

The court are of opinion that the evidence proposed in the case at bar was incompetent, and that the verdict for the defendants was properly ordered. The plaintiff has, however, leave to amend by striking out the names of all the plaintiffs except John S Bates, who will be entitled to recover, to the extent of his interest in the property insured.

ADMISSIBILITY OF EVIDENCE TO EXPLAIN OR CONTROL POLICY OF INSURANCE: See *Norris v. Insurance Co.*, 2 Am. Dec. 380, and note.

THE PRINCIPAL CASE IS CITED IN *Clark v. Manufacturers' Ins. Co.*, 2 Woodb. & M. 480, to the effect that the general rule of evidence prohibiting parol testimony to alter or vary a written contract, applies to policies of insurance.

COYE v. LEACH.

[8 METCALF, 571.]

PRESUMPTIONS OF SURVIVORSHIP, WHICH PREVAIL AT THE CIVIL LAW where death ensues in a common disaster, have no sanction in our system of jurisprudence, either as a principle of the common law, or by statutory enactment.

DISPARITY OF AGE MAY BE CONSIDERED IN DETERMINING THE QUESTION OF SURVIVORSHIP, as between an adult and an infant, or a person well stricken in years.

NO PRESUMPTION OF SURVIVORSHIP EXISTS, as between a father, seventy years of age, and his daughter thirty-three years of age, each of whom perished in the same disaster. In the absence of all evidence of survivorship in such case, the presumption is that the death of each occurred at the same instant.

SURVIVORSHIP. The facts appear in the opinion.

Eddy and Coffin, for the appellants.

W. Baylies, for the appellee.

By Court, DEWEY, J. This case presents a question of peculiar difficulty. The parties admit the existence of certain facts, with the further statement of a want of all evidence on certain other points; which latter admission seems almost to render it impracticable to decide satisfactorily as to the respective rights of the contending parties. The facts admitted are, that Sylvanus Keith, his only daughter, Caroline E. Coye, with her husband George W. Coye, and their only child, Caroline K. Coye, were

on board the steamboat Pulaski, on a voyage from Charleston to Baltimore, when the boat was lost, and they all perished at sea, on the fourteenth of June, 1838. The parties then agree the further fact, that no evidence can be obtained tending to show which of said persons actually survived. This statement, thus assented to, precludes all aid that might have been derived from any evidence of the circumstances attending the destruction of the boat, the position of the persons in the same, or any fact connected therewith, raising any presumption of survivorship. Had there been any circumstances, however slight, bearing on these points, they would have been material, as from slight circumstances, inferences of fact might have been drawn, which would materially affect the question before us. The case, however, is barren of all evidence upon these points, and is to be settled without aid from them. We are, therefore, brought directly to the inquiry, whether, in the case of several persons perishing at sea in one common disaster, the question of survivorship can be settled by any legal presumptions deduced from the single fact of difference in age and sex.

By the civil law, Mrs. Coye, the daughter of Mr. Keith, would be presumed to have survived her father, as the child, if above the age of puberty, is presumed to have survived the parent: *Greenl. Ev.*, sec. 29; *Dig.*, lib. 34, tit. 5. But no such doctrine has any sanction in our system of jurisprudence, either as a principle of the common law, or enacted by legislative authority. By the Code Napoleon, b. 3, tit. 1, c. 1, arts. 720, 721, 722, it is provided, that where several persons perish by one and the same accident, so that it is not possible to ascertain which of them died first, the presumption as to survivorship is to be determined by the circumstances of the event, and, in the absence of all such evidence, by the age and sex of the persons. Art. 721. "If those who perish together were under fifteen years, the eldest shall be presumed to have survived. If they were all above sixty, the youngest shall be presumed to have survived. If some were under fifteen years, and others more than sixty, the former shall be presumed to have survived." Art. 722. "If those who perished together were of the age of fifteen years complete, but less than sixty, the male is always presumed to have survived, where there is equality of age, or the difference which exists does not exceed one year. If they were of the same sex, the presumption of survivorship, which gives rise to succession according to the order of nature, must be admitted; thus the younger is presumed to have survived the elder."

These are clearly arbitrary rules, as, in the nature of things, a week or day less than the respective ages named would not usually, in any degree, affect the ability of the party to sustain and prolong life in case of exposure by shipwreck. Such rules being thus arbitrary in their character, to some extent, would seem to require a legislative sanction; and it may be expedient and proper to provide; by a legislative act, for cases of this character and description. But, without such legislation, we do not feel authorized to adopt any fixed period of age, as decisive of the question of survivorship of those who perish in a common disaster, and where no facts or circumstances are known, that would aid in deciding the point of survivorship. To a certain extent we might well go, in applying the principle as to disparity of age. Thus it would be proper and reasonable to hold that one of middle age and in the full vigor of life, would ordinarily survive a mere infant, or child of very tender years; and the same would be alike true as to such person and the man well stricken in years.

We therefore should probably have no difficulty, in the present case, in disposing of the question of the survivorship of Caroline K. Coye, the granddaughter of Mr. Keith. Her age and strength were less adapted to sustain her, in the continuance of the struggle for life, under this peril, than those of her mother or her grandfather, and might be so held without resort to any arbitrary rule as to a precise point of time in the age of the parties. But when we approach the case of Caroline E. Coye, and are asked to find that she survived her father, Mr. Keith, we find, on the one hand, the age of Mrs. Coye to have been somewhat more favorable to her survivorship, though far less decisive than in comparison of her case with that of her infant daughter. But we have the opposing circumstance, that she was of the weaker sex; and thus one presumption operates to neutralize the other, and the known facts fail to present a case of controlling presumption in favor of either. The case stated, then, stands thus: Sylvanus Keith and his daughter, Mrs. Coye, perished in the same disaster. No fact is shown giving the least indication that either party, from the nature of the accident or the position of the parties, had any advantage over the other for protracting life. Nothing is shown of their peculiar capabilities arising from personal strength or vigor. Nothing indeed is put into the case, to control it in favor of either, besides age and sex; and these, as already remarked, are not decisive tests in the present case. In truth, there is nothing

in the case to show that either the father or the daughter survived the other. The evidence in the case, upon the facts stated by the parties, fails to show that the estate of Sylvanus Keith ever vested in Caroline E. Coye, his daughter. To effect this, it was necessary that she should have survived her father. We do not feel authorized to say that this fact is satisfactorily established. For aught that appears in the present aspect of the case, they may both have perished together. This being so, and no arbitrary presumption being authorized by law in such cases, arising from age or sex, the consequence is, that those who seek to enforce their rights, as heirs at law of Caroline E. Coye, must fail in establishing their right to a distributive share in the estate of Sylvanus Keith. As to the granddaughter, Caroline K. Coye, the evidence of her survivorship is inferior to that of her mother, and no claim can be sustained through her.

The general question arising in the present case has been somewhat considered in the English common law courts, and also in the courts of chancery; but more frequently in the prerogative courts. And the decisions in those courts seem to favor the view we have taken of the present question. The question arose in *The King v. Dr. Hay*, 1 W. Bl. 640, in the case of General Stanwix, who, together with his wife and daughter, perished while on a voyage at sea, the vessel having never been heard from, and no evidence produced of the circumstances of her loss. The case was never decided, it being compromised (as is said by Sir William Scott), at the recommendation of Lord Mansfield, who said, "there was no legal principle on which he could decide it:" *Taylor v. Diplock*, 2 Phillim. 268. In *Mason v. Mason*, 1 Meriv. 308, where the testator, a middle-aged man, had embarked with his son, at Bengal, on board the *Calcutta*, on a voyage to England, and the ship was lost on her homeward voyage, and all on board perished, the master of the rolls held that the rules of the civil law had not been adopted in such cases, and that he could not see how any presumption could be raised as to who survived. He refused to find that the son survived, but directed an issue to be framed, and sent to the jury, to find whether the son was living at the death of the testator. In *Taylor v. Diplock*, 2 Phillim. 261, where husband and wife perished on board a ship which was wrecked, and where there was no satisfactory evidence as to survivorship, or any circumstances shown, of a decisive character, as to the ability of the several persons to sustain a peril,

it was held that it must be assumed that the husband and wife both perished at the same moment.

In *Sillick v. Booth*, 1 You. & Coll. C. C. 121, it was held that, where two persons die by the same accident, and there are no special circumstances in evidence, from which it may be presumed that one died before the other, the law of England will draw that presumption from general circumstances, such as the comparative health, strength, age, or experience of the parties. In *Schwyn's Case*, 3 Hag. Ecc. 748, where husband and wife perished together at sea, and no circumstances of the disaster were known, showing any advantage on the part of either, the court said, "in the absence of clear evidence it has generally been taken that both died at the same moment." These cases strongly confirm the view we have taken of the naked question now presented to us, and unaccompanied by any circumstances that might authorize us to raise a presumption in favor of the survivorship of either the father or daughter. The age is the only circumstance relied upon by those claiming in the right of the daughter; but that is supposed to be controlled, or at least so far neutralized by the sex of the father, as to leave the case without proof, warranting the presumption that the daughter survived the father.

After much consideration of the question, and fully impressed with the difficulties attending it, the court have come to the result, that the distribution of the personal estate of the late Sylvanus Keith, now in the hands of his administrator, is to be made in favor of his nephews and nieces, as his heirs at law, to the exclusion of those persons who claim the same as heirs either of Caroline E. Coye or Caroline K. Coye.

Decree affirmed.

PRESUMPTION OF SURVIVORSHIP WHEN DEATH RESULTS FROM SAME CATASTROPHE—AT THE CIVIL LAW.—The determination of the question of the relative times of death of two or more persons, who perish in the same catastrophe, such as shipwreck, conflagration, or battle, for the purpose of ascertaining who was the survivor, is at all times attended with difficulty and uncertainty, and when the right to the succession of estates is concerned, in which connection the question is generally presented, may be of great and controlling importance. To the Roman and continental jurists this question, when the circumstances attending the death were unknown, was one of refined distinctions, in the determination of which recourse was had to certain presumptions, based upon an assumed probability of survivorship resulting from age, sex, and strength. By the Roman law, in the case of the death of a father and his son, in the same calamity, the presumption was, if the latter was under the age of fifteen, that he died first, but if above that age, that he was the survivor; the supposition being that in the former case the elder, and

In the latter case the younger, is generally the stronger, and more able to resist and prolong the impending destruction: Dig., lib. 34, tit. 5; De rebus dubiis, lib. 1, 9; sec. 1, 3; Id. 1, 16, 22, 23; Menochius de Praes, lib. 1, Quæst. x. n. 8, 9; Burge's Com. on Colonial and Foreign Laws, vol. 4, pp. 11-29. This rule, however, was subject to various exceptions in favor of mothers, patrons, and beneficiaries. In the French law the subject was one of doubt and perplexity until the adoption of the code Napoleon. It is provided by this code, sec. 720 *et seq.*, that if several persons respectively called to the succession of each other, perish by one and the same accident, so that it is not possible to ascertain which of them died first, the presumption of survivorship is determined by the circumstances of the event, and in defect of such, by force of age and sex, as follows: If those who perished together were under fifteen years, the eldest is presumed to have survived; if they were all above sixty, the youngest is presumed to have survived; if some were under fifteen years, and others more than sixty, the former are presumed to have survived; if those who perished together were of the age of fifteen years complete, but less than sixty, the male is always presumed to have survived, where there is equality of age, or if the difference which exists does not exceed one year; if they were of the same sex, the presumption of survivorship which gives rise to succession according to the order of nature must be admitted, and the younger is presumed to have survived the elder: Burge's Com. on Col. and For. L., vol. 4, p. 26; Duranton, Cours de Droit Français, tom. 6, pp. 39, 42, 43, 48, 67, 69; Rogron, Code Civil, Expli. 411, 412; Toullier, Droit Civil Français, tom. 4, pp. 70-73. Similar rules prevailed in Louisiana prior to its cession to the United States, and have since been incorporated into its code: Civil Code, arts. 930-933. And the same, with some slight modification, have been adopted by the California code of civil procedure, sec. 1963, subd. 40.

AT THE COMMON LAW, both in this country and in England, the rules of the civil law where death ensues from the same catastrophe, have never been adopted, although they have frequently been strenuously urged upon the courts, and the doctrine is now conclusively established that in cases of this character, and in the absence of all evidence tending to show a positive survivorship, the matter will be treated as unascertainable, and property rights will be disposed of as if death occurred to all at the same moment. While, therefore, there is no presumption, either that one survived, or that death came to all at the same moment, it is safe to say, as was said by the court in *Russell v. Hallett*, 23 Kan. 276, that "the practical consequence is nearly the same as if the law presumed all to have perished at the same moment." In some of the earlier cases in the ecclesiastical courts, the opinion was expressed that the presumption was that they all died together: *Wright v. Netherwood*, 2 Phillim. 266, n. (c); S. C., 2 Salk., Evan's ed. 593 n. (a); *Taylor v. Diplock*, 2 Phillim. 261; *In re Selwyn*, 3 Hagg. 748; *In re Murray*, 1 Curt. 596; *Satterthwaite v. Powell*, Id. 706. And this opinion has met with some support from the unguarded expressions of judges in subsequent cases: *Stinde v. Goodrich*, 3 Redf. 89; *Coye v. Leach*, 8 Metc. 371. In *Mason v. Mason*, 1 Meriv. 312, however, the master of the rolls refused to decide a case where a father and son perished in the same catastrophe, and directed an issue to be submitted to a jury to determine the question of survivorship. And in *Moehring v. Mitchell*, 1 Barb. Ch. 264, where a husband, wife, and infant daughter perished by shipwreck, the court went so far as to hold, that while there was no presumption that the daughter survived the mother, the husband would be presumed to have survived the wife, on the ground that the greater

strength of the man would probably enable him to sustain life the longer, and the same opinion was intimated in *Colvin v. Procurator-general*, 1 Hagg. 92. So, also, in *Silleck v. Booth*, 1 You. & Coll. C. C. 117, it was decided by Vice-chancellor Knight-Bruce, that a presumption of priority of death would be raised from the comparative age, strength, and health of the parties, and that where two brothers perished in shipwreck, the elder being the master, and the younger the second mate of the vessel, the former would be presumed to have survived the latter, as being the more experienced sailor. Taylor, however, remarks, in his work on evidence, vol. 1, sec. 160, "that this case can not be relied upon as an authority, since it is opposed to a long current of decisions." In *Underwood v. Wing*, 4 De G. M. & G. 633, and in *Wing v. Augrave*, 8 H. L. Cas. 182, this subject underwent a thorough examination, in which the prior decisions were elaborately reviewed, and the conclusions reached, that no inferences of law can be drawn from age or sex; that there was no presumption that either the husband or wife survived the other, or that both died at the same time; that the question is to be decided upon the circumstances proved in each particular case, the *onus probandi* lying on the party asserting the survivorship.

In discussing this question Mr. Justice Wightman said in *Underwood v. Wing*, *supra*, page 652: "The question of survivorship is the subject of evidence to be produced before the tribunal which is to decide upon it, and which is to determine it as any other fact. If there be satisfactory evidence to show that the one survived the other, the tribunal ought so to decide, independent of age or sex, and if there be no evidence, the case is the same as a great variety of other cases, more frequent formerly than at present, where no evidence exists, and of consequence no judgment can be formed. * * * We may guess, or imagine, or fancy, but the law of England requires evidence." And in commenting upon the language reported to have been used by the master of the rolls in deciding this case below, to the effect that as there was no evidence to show who was the survivor, the conclusion of law was, that they both died at the same moment, the same learned judge said: "According to our view this is not correct; we think there is no conclusion of law upon the subject; in point of fact we think it unlikely that both actually did die at the same moment of time, but there is no evidence to show which of them was the survivor." In the recent case of *Newell v. Nichols*, 75 N. Y. 78, the same question came before the court of appeals, and the same conclusions were reached. The opinion of Church, C. J., contains so able a presentation of the doctrine and the reasons upon which it is founded, that we quote from it at length. On page 88, the learned chief justice said: "There is no legal presumption which courts are authorized to act upon that there was a survivor any more than that there was a particular survivor. It is not claimed that the children died at the same time. Indeed it may be conceded that it is unlikely that they ceased to breathe at precisely the same instant, and as a physical fact it may perhaps be inferred that they did not. But this does not come up to the standard of proof. The rule is that the law will indulge in no presumption on the subject. It will not raise a presumption by balancing probabilities, either that there was a survivor, or who he was. In this respect the common law differs from the civil law. * * * It is regarded as a question of fact to be proved, and evidence merely that two persons perished by such a disaster, is not deemed sufficient. If there are other circumstances shown, tending to prove survivorship, courts will then look at the whole case for the purpose of determining the question, but if only the fact of death by a common disaster appears, they will not undertake to solve it on account of the nature of the question, and its inherent un-

certainty. It is not impossible for two persons to die at the same time, and when exposed to the same peril under like circumstances, it is not as a question of probability very unlikely to happen. At most the difference can only be a few seconds. The scene passes at once beyond the vision of human penetration, and it is as unbecoming as it is idle for judicial tribunals to speculate or guess whether during the momentary life struggle one or the other may not have ceased to gasp first, especially when the transmission of title to property depends upon it, and hence in the absence of other evidence the fact is assumed to be unascertainable, and property rights are disposed of as if death occurred at the same time. This is done not because the fact is proved, or that there is any presumption to that effect, but because there is no evidence, and no presumption to the contrary." See also to the same effect, *In re Green's Settlement*, L. R., 1 Eq. 288; *In re Carmichael*, 32 L. J., P. M. & A. 70; *Robinson v. Gallier*, 2 Wood, 178; *Russell v. Hallett*, 23 Kan. 276; *Barrett v. Tugwell*, 31 Beav. 232; *Smith v. Croom*, 7 Fla. 140; *In re Ridgway*, 4 Redf. 226; *In re Phend's Trusts*, L. R., 5 Ch. App. 139; *Pell v. Ball*, 1 Cheves' Eq. 99; Greenl. on Ev., secs. 29, 30; 2 Best's Ev. 187; 1 Taylor's Ev., sec. 159; 2 Kent's Com. 435; 4 Burge's Com. on Col. and For. L. 11-29.

What evidence is sufficient to warrant a finding of survivorship as a question of fact, depends entirely upon the circumstances attending each particular disaster, in the determination of which the respective situations of the parties with respect to locality and consequent exposure to danger, and also to their physical strength as imparting more or less ability to combat the impending peril, may be inquired into; and where the evidence has shown the parties to be exposed to a common danger, which has proved fatal to both, the one last seen or heard, within the operation of the cause of death, has been held to be the survivor, unless other evidence shows the contrary: *Smith v. Croom*, 7 Fla. 140. Thus the wife will be held to survive her husband, where, after the wreck of the vessel in which they both perished, she was seen and heard to call for her husband, but he neither answered nor was heard or seen, at any time after the disaster: *Pell v. Ball*, 1 Cheves' Eq. 99. But see, presumably to the contrary, *Russell v. Hallett*, 23 Kan. 276, where the fact, that after the overturning of a boat, from which a mother and her infant children were drowned, the mother was heard to cry for help, was held not conclusive that she survived; and *In re Ridgway*, 4 Redf. 226, in which a similar conclusion was reached as to a woman and her grandchildren who were on the pavilion upon the deck, after a disaster to the ship, and the grandmother was washed from the pavilion, but there was no evidence as to whether she was carried into the sea, and the children were seen some fifteen minutes after alive on the pavilion. So also it is not sufficient to conclude from the fact that the husband was a strong man and a good swimmer, and the wife a weak and delicate woman who could not swim, that he survived her: *Wing v. Augrave*, 8 H. L. Cas. 183; *Underwood v. Wing*, 4 De G. M. & G. 633.

JONES v. HOWLAND.

[8 MORTGAGE, 377.]

SALE MADE BY AN INSOLVENT DEBTOR, who honestly believes he shall be able to continue his business, in payment of a just debt, and without a design to give a preference, is not fraudulent within the meaning of the second section of the United States bankrupt act of 1841, although bankruptcy should immediately ensue.

WHETHER A SALE MADE BY AN INSOLVENT DEBTOR IS FRAUDULENT as giving a preference, depends upon the intent with which the act is done; such intent is to be proved, as a fact, either by direct evidence, or as the necessary and certain consequence of other facts clearly proved.

TROVER brought by the assignee of W. H. Stowell, a bankrupt, to recover for certain oil sold to the defendants, and claimed to have been fraudulently conveyed to them, in preference of the other creditors. The action was sought to be sustained under the second section of the United States bankrupt act of 1841. The further facts appear in the opinion.

Choate and Eliot, for the defendants.

Coffin and Colby, for the plaintiff.

By COURT, HUBBARD, J. This case turns upon the fact, whether the respective sales to the defendants by Stowell, which the plaintiff seeks to avoid, were made in contemplation of bankruptcy, and with the view of giving the defendants a preference over his general creditors, or whether they were made with an honest intent, in the transaction of his business, and not in contemplation of bankruptcy. The question presented in the case grows out of the instructions of the presiding judge on committing the cause to the jury; and in considering the subject, it is not necessary to recite the facts as they appeared on the trial. The instructions to the jury, were embraced in the three following propositions, which the judge charged them it was necessary for the plaintiff to prove, to entitle himself to a verdict: 1. That Stowell was insolvent at the time he made the sales or transfers of the oil to the defendants. 2. That he knew or believed he was insolvent at those times. 3. That he made them for the purpose of preferring the defendants. Under this last head, the judge instructed the jury that, if Stowell knew he was insolvent at the time, they might infer from that fact, that he made the transfer for the purpose of preferring the defendants: That if he knew or believed himself to be insolvent, he must be supposed to intend the natural result of his act: That if he made a transfer of a large quantity of oil he must have known that it would operate as a preference: That the plaintiff undertook to show Stowell's insolvency, of which there was no doubt, and that Stowell knew it, which was denied by the defendants; and that it was for the jury to judge, upon all the evidence on both sides, whether they were satisfied that he knew it.

The cause has been elaborately argued, and the leading authorities, being principally the adjudged cases in England, com-

mencing with the decisions in the time of Lord Mansfield, and coming down to the present day, have been cited. And though the late bankrupt law of the United States is different, in its provisions, from the English statutes, in respect to payments and transfers of property declared to be void, yet the English decisions throw much light on the language of our statute, which was probably in part framed by incorporating into it the principles of those decisions.

The provision of the statute of 1 Jac. I., c. 15, sec. 2, was, that every person using the trade of merchandise, who should "make, or cause to be made, any fraudulent conveyance of his lands, tenements, goods, or chattels, to the intent, or whereby, his creditors shall or may be defeated or delayed for the recovery of their just and true debts, shall be accompted and adjudged a bankrupt." But the words of the United States bankrupt act of 1841, sec. 2, are, that "all conveyances or transfers of property, in contemplation of bankruptcy, and for the purpose of giving any creditor, etc., any preference or priority, etc., shall be deemed utterly void, and a fraud upon this act." This phrase, "in contemplation of bankruptcy," is in common use in the English reports; but Gibbs, C. J., in *Fidgeon v. Sharpe*, 5 Taunt. 541, said, "with respect to this doctrine of contemplation in cases of bankruptcy, we have nothing, either in the common or statute law, to show what it is. The cases in which this doctrine was introduced make it depend upon the *quo animo*."

It is unnecessary to review the various cases in which the subject is discussed; but the later ones state the doctrine as now received in the courts of Westminster hall, distinctly. In *Morgan v. Brundrett*, 5 Barn. & Adol. 297, Patterson, J., says, "the recent cases have gone too great a length. They seem to have proceeded on the principle, that if a party be insolvent at the time when he makes a payment or a delivery, and afterwards become bankrupt, he must be deemed to have contemplated bankruptcy at the time when he made such payment; but I think that is not correct; for a man may be insolvent, but yet not contemplate bankruptcy." And Parke, J., says, "the meaning of those words" (in contemplation of bankruptcy) "I take to be, that the payment or delivery must be with intent to defeat the general distribution of effects which takes place under a commission of bankruptcy. It is not sufficient that it should be made (as may be inferred from some of the late cases) in contemplation of insolvency. These cases, I think, have gone too far."

The cases referred to, as carrying the doctrine too far, are

Pulling v. Tucker, 4 Barn. & Ald. 382, and *Poland v. Glyn*, 2 Dow. & Ry. 310. In the last of these, Bayley, J., says, "I take the general rule of law upon this subject to be, that a voluntary payment to one creditor, under circumstances which must reasonably lead the debtor to believe bankruptcy probable (not inevitable; for I do not think it necessary the rule should go that length), is a fraud upon the other creditors, within the meaning of the bankrupt laws, and that money so paid may be recovered by the assignees, when a bankruptcy has taken place." And in the other case, Abbott, C. J., after speaking of what was submitted to the jury, says: "Indeed, if it were material that the deed should have been executed in contemplation of bankruptcy, there is very strong evidence to show that it was so done in this case; for the bankrupt, being in insolvent circumstances, conveys his real estate to certain persons as a security for debts then due, or any other debts which might accrue due. Such a deed given under such circumstances, would make bankruptcy inevitable; and a man must be supposed to contemplate the consequence of his own acts." See also *Flook v. Jones*, 4 Bing. 20, and *Arnold v. Maynard*, 2 Story, 349. The objection to the doctrine drawn from these cases is, that the design to give the preference, in fraud of the law, is directly inferred from the mere fact of the insolvency; whereas such fact does not necessarily prove a contemplated bankruptcy.

The doctrine, we think, is correctly and clearly laid down by Gibbs, C. J., in the case of *Fidgeon v. Sharpe*, 5 Taunt. 545. He observes that "the general effect of the statutes on the subject of bankrupts is, that all payments made before bankruptcy are legal and valid; but a certain class of cases has arisen, in which certain payments have been supposed to be made in fraud of the bankrupt laws, and are, therefore, fraudulent and void. But I find in all the cases, from Fordyce's to the present, the fact found, that the act was done in fraud of the bankrupt laws. It must be an act, then, not only that in effect contravenes the bankrupt laws, but it must be done with intent to contravene them, and in contemplation of bankruptcy. The innocence or guilt of the act depends, then, on the mind of him who did it; and it can not be in fraud of the bankrupt laws, unless the actor meant it should be so." See also, *Hartshorn v. Slodden*, 2 Bos. & Pul. 582; *Gibbins v. Phillipps*, 7 Barn. & Cress. 529; *Atkinson v. Brindall*, 2 Bing. N. Cas. 225, and S. C., 2 Scott, 369; *Belcher v. Prittie*, 10 Bing. 408. The result of these cases is the drawing of a distinction between an actual insolvency and

a contemplated bankruptcy; between the payment of a just debt in the course of business, though insolvency exists and is known to the insolvent, and the design to give a preference, in view of stopping payment. And in view of all the authorities we hold the law to be this; that though insolvency in fact exists, yet if the debtor honestly believes that he shall be able to go on in his business, and, with such belief, pays a just debt, without a design to give a preference, such payment is not fraudulent, though bankruptcy should afterwards ensue. And on the other hand, if the debtor, being insolvent, and knowing his situation, and expecting to stop payment, shall then make a payment or give security to a creditor for a just debt, with a view to give him a preference over the general creditors, such payment or giving security is fraudulent as against the creditors, and property that is transferred, in making such payment or giving the security, may be recovered by his assignee; and the debtor will not be entitled to a discharge under the statute. It rests upon the intent with which the act was done; and the intent is to be proved, as a fact, either by direct evidence, or as the necessary and certain consequence of other facts clearly proved.

In respect to the charge of the judge, in the case at bar, it will be found, when carefully examined, to express the opinion that the fact of insolvency being proved, and a knowledge of it on the part of Stowell, the debtor, the jury were bound to infer the intention of Stowell to make a fraudulent preference; because he must be held to have intended the natural result of his act; and, consequently, that his act was in fraud of the bankrupt law. This direction, though in accordance with the opinions of the court in *Poland v. Glyn*, 2 Dow. & Ry. 310, and *Pulling v. Tucker*, 4 Barn. & Ald. 382, is, we think, broader than is warranted by the cases of *Fidgeon v. Sharpe*, 5 Taunt. 545; *Morgan v. Brundrett*, 5 Barn. & Adol. 297, and *Atkinson v. Brindall*, 2 Bing. N. Cas. 225, which, as before observed, we think, lay down the law correctly.

The charge assumes, as a fact, the very thing which is to be proved, namely, the intent which actuated the debtor, at the time of making payment; whereas insolvency may be known to exist, and yet the debtor, though compelled to make sacrifices, be determined to go on with his business, and not yield to the pressure, and thus make payments without any intention of giving a preference in contemplation of bankruptcy. Such instances are not of very rare occurrence; and such intent should have been more freely submitted to the jury. It is said that a

man must be supposed to intend the natural result of his act. But this remark, though often treated as an axiom, is by no means an infallible proposition. The result is not always evidence of the supposed intent. When we look back upon events that have happened, we stand in a different position; we behold with a clearer vision, as we embrace within our glance the beginning and the end, the act and the consequence. But the man who is doing the act may contemplate a very different result. His judgment may be biased by his wishes, and sanguine feelings may be the cause of overlooking difficulties, which to a more quiet temperament might appear insurmountable. Disappointments also may take place, which were not anticipated. The experience of others is rarely a guide to an embarrassed man, and he goes on with the hope of relief, even against hope. To infer, therefore, a design to give a preference to a favored creditor, and in the immediate expectation of bankruptcy, from the mere fact of insolvency, is by no means a certain inference, nor such as the jury would be necessarily bound to draw from the debtor's knowledge of his insolvency. The evidence must also go further, and establish, as a fact, the design to give the preference—a fact too important to be left upon conjecture.

The instruction requested by the counsel for the defendants was substantially correct. With some slight modification, it may be stated as follows: That if, on the eighth day of March, Stowell feared or believed himself to be insolvent, but did not contemplate stoppage or failure, and intended to keep on and make his payments, and transact his business, hoping that his affairs might be thereafterwards retrieved, and, in that state of mind, made the sale or payment of that day, without intending to give a preference to the defendants, and as a measure connected with going on in his business, and not as a measure preparatory to or connected with a stoppage in business, then the sale or payment, on that day, was not a sale or payment made in contemplation of bankruptcy, within the meaning of the act. It is insisted by the counsel for the plaintiff, that the case of *Arnold v. Maynard*, 2 Story, 349, is directly in point, to sustain the instructions which were given to the jury. And it is true that the reasoning there does go to support the cases which the later English authorities say have carried the doctrine of contemplation of bankruptcy too far. But the case itself, though with some features of similarity, is founded upon a very different statement of facts, and in which the design to give the preference is not drawn into doubt; and the answers to the questions

referred to the court do not advance a doctrine different from that which we think is correct.

A similar question has arisen before the United States district court in Vermont. In the *Matter of Pearce*, 6 Law Rep. 261, the learned judge held that "it is not a necessary and legal inference, that a conveyance was made in contemplation of bankruptcy, merely because the debtor was insolvent at the time; but it must appear that the conveyance was made by the debtor in anticipation of breaking or failing in his business, of committing an act of bankruptcy, or of being declared bankrupt at his own instance, and intending to defeat the general distribution of his effects." And with this we fully concur. It is unnecessary to remark on the charge under the second head, further than to say, that if the sale was only partially executed on the fourth of April, and at the time of completing it, Stowell knew he must stop, and therefore completed it in order to give the preference, such sale is fraudulent and void. We, of course, do not mean to express any opinion upon the evidence as detailed in the report of the presiding judge; the questions of fraud, raised by the plaintiff, being peculiarly within the province of the jury. In conformity with these views, the verdict is set aside, and a New trial granted.

INSOLVENT DEBTOR'S RIGHT TO PREFER CREDITORS: See a full discussion of this subject in the notes to *Crawford v. Taylor*, 26 Am. Dec. 584, and *Dulaney v. Hoffman*, 28 Id. 219, referring to other cases in this series. In commenting upon the doctrine of the principal case, and its applicability to the United States bankruptcy law of 1867, the court, in *Hall v. Wager*, 3 Biss. 32, said: "The case of *Jones v. Howland* arose under the bankruptcy act of 1841, and the supreme court of Massachusetts has not followed that as applicable to their insolvent law, from which this section of the bankrupt act of 1867, under consideration, was copied. Chief Justice Shaw, in delivering the opinion of that court, in *Holbrook v. Jackson*, 7 Cush. 136, says: 'The provision of the bankrupt law of the United States, under which the case of *Jones v. Howland* was decided, was very different from the present; it turned on the question of actual belief and intent, and not on reasonable ground of belief.' And in the same opinion, page 149, he says: 'We do not think it necessary, in order to avoid the conveyance, that the debtors knew they were insolvent, or in fact contemplated proceedings in insolvency; it is enough that they were in fact insolvent, and had no reasonable ground to believe themselves solvent.'" This decision of Chief Justice Shaw has been since uniformly followed in Massachusetts, and adopted by the United States supreme court as the correct doctrine on the subject. See *Thompson v. Thompson*, 4 Cush. 127; *Lee v. Kilburn*, 3 Gray, 594; *Holbrook v. Jackson*, 7 Cush. 137; *Williams v. Coggeshall*, 8 Id. 381; *Barnard v. Crosby*, 6 Allen, 327; *Forbes v. Howe*, 102 Mass. 435; *Wager v. Hall*, 16 Wall. 599.

THE PRINCIPAL CASE IS ALSO CITED IN *Otis v. Hadley*, 112 Mass. 106, to the point that an assignee in bankruptcy, under the United States statute, can sue in the state courts.

MUMFORD v. FREEMAN.

[8 METCALF, 432.]

PROMISE TO PAY A DEBT BARRED BY THE STATUTE OF LIMITATIONS must be unconditional, or there must be such an unqualified admission of present indebtedness, from which such promise can be inferred, in order to take such debt out of the operation of the statute.

ASSUMPSIT on three promissory notes, to which the defendant pleaded the statute of limitations. To take the case from out the operation of such statute the plaintiff relied upon a letter of the defendant, in which he made a conditional promise to pay the notes "if he lived and the whaling business did not fail."

Eliot, for the plaintiffs.

Colby, for the defendant.

By COURT. The acknowledgment and promise to renew the notes on certain terms were conditional, and the terms were not acceded to. The letter does not express either an unconditional promise to pay, or an unqualified admission of present indebtedness, from which such promise can be inferred, so as to take the case out of the operation of the statute of limitations: *Barnard v. Bartholomew*, 22 Pick. 291; *Moore v. Bank of Columbia*, 6 Pet. 92.

Judgment for the defendant.

REVIVAL OF DEBT BARRED BY THE STATUTE OF LIMITATION, by promise of payment, or acknowledgment of indebtedness: See this subject fully discussed in the notes to *Lord v. Sheler*, 8 Am. Dec. 163; *Burden v. McElhenny*, 10 Id. 570; *Beits v. Fuller*, Id. 693; *Mellick v. De Seelhorst*, 12 Id. 172; *Olcott v. Scales*, 21 Id. 585; *Conway v. Williams*, 29 Id. 466; *Sutton v. Burruss*, 33 Id. 246.

CARY v. DANIELS.

[8 METCALF, 466.]

RIPARIAN PROPRIETORS HAVE A RIGHT TO THE USE AND ENJOYMENT of the stream as it passes through their land, but as this right is common to all through whose land the stream flows, no one proprietor can wholly destroy or divert it, either by preventing the water from flowing to a lower proprietor, or by throwing it back upon the mills or lands of one above.

RIPARIAN PROPRIETOR, WHO FIRST ERECTS HIS DAM for reasonable mill purposes, has a right to maintain it as against proprietors above and below, although by so doing the proprietor above is prevented from placing a dam and mill on his land. In such case prior occupancy gives a prior right to such use.

RIPARIAN PROPRIETOR, WHO ERECTS A DAM AND MILL FOR THE PURPOSE of using the surplus water discharged from the mill of another proprietor first located, is, as to such surplus, the first appropriator, and will be protected in the prior use thereof against the acts of the proprietor who first erected his mill.

RIGHT TO THE USE AND POWER OF FLOWING WATER MAY BE ACQUIRED by grant from the proprietor in whom it is vested, or by such an exclusive, adverse, and continued enjoyment as is in law regarded as evidence of a grant.

RIGHT TO THE USE OF THE FLOW AND FALL OF THE WATER on the land of the proprietor is not an easement; it is inseparably connected with and inherent in the land, is parcel of the inheritance, and passes with it.

RIGHT TO THE USE OF WATER BELOW CERTAIN GRANTED PREMISES, in accordance with an appropriation previously made, is not an incumbrance within the meaning of a covenant against incumbrances, but a parcel of such lower estate.

PRIOR APPROPRIATOR, WHO REMOVES HIS DAM LOWER DOWN THE STREAM, is not liable to another and subsequent appropriator, provided no larger appropriation of the stream is made than existed before.

TRESPASS on the case. Both plaintiff and defendant were owners of separate mills on the Charles river. The mill of plaintiff was situated a quarter of a mile above that of defendant. In 1833, both mills were owned in common by William Feltt, Gilbert Clark, Jacob Hall, Luther Capron, and the plaintiff. The upper mill was the oldest and largest. The parties derived title to their respective mills by conveyances from the tenants in common, which contained covenants against incumbrances. The defendant had abandoned his prior dam, and erected another, lower down the stream, by means whereof the water was thrown back upon plaintiff's mill. The further facts appear in the opinion.

B. R. Curtis, for the defendant.

Choate and Wilkinson, for the plaintiff.

By Court, *SHAW, C. J.* The leading fact in the present case is, that at the time when Hall and others, under whom the defendant claims, conveyed the upper mill to Wilson, under whom the plaintiff claims, they were also the owners of the lower mill, the dam of which is complained of by the plaintiff in this action, as a nuisance. The complaint is, that the lower dam is so raised as to set back the water and obstruct the free use of the plaintiff's water-wheels. Two questions were made at the trial: 1. Whether, as contended for by the plaintiff, he is not entitled, as against the defendant, to a free and unobstructed use of the stream below his mill, including a right to have the water run off as low as it would run in its natural bed;

or whether, as the defendant contends, the plaintiff is entitled to no greater privilege in this respect, than that which was used for the upper mill against the lower, with the dam raised to the same height to which it was raised when the conveyance was made from the owners of both mills to Wilson. 2. Whether the plaintiff and those under whom he claims, with the conveyance of the upper mill, acquired a right to continue a practice, which had formerly existed when both mills were owned by the same persons, for the occupants of the upper mill, in times of high water, to go down to the middle dam and open the waste-gates therein, and by this means relieve the upper mill from back water; and, if so, whether it was a violation of this right, for which the plaintiff can maintain an action, that the defendant had taken away the middle dam, and erected his dam several hundred feet lower down, by means of which, and by the mode of constructing his new dam, he had rendered it impracticable, or more burdensome and expensive, to exercise such right of opening the waste gates and relieving his mill from back water.

On the first point, we are of opinion that the claim can not be maintained. It is placed on the ground, that the owner of land, through which a stream of water passes, has a right to the run of the water in its natural channel through his land; that a grant of the land, *prima facie*, and without express reservation, is a grant of such right, and therefore that a grant to Wilson, by Hall and others, who were then owners of both mills, was a grant of an unobstructed flow of the stream below the land granted; and hence, that the grantors could not erect any dam, or maintain any dam already erected, which would in any manner obstruct the flow of the stream in its natural channel, and that the defendant, being privy in estate with those grantors, took the lower mill subject to the same right of the grantee and his assigns. The plaintiff also relies upon the covenants, contained in the deeds of the same grantors to Wilson and his assigns, that the granted premises were free from all incumbrances brought thereon by them, and that, if there was a right to maintain the lower dam, so as in any degree to throw back water upon the plaintiff's mill, it would be an incumbrance.

It is agreed on all hands, that the owner of a parcel of land, through which a stream of water flows, has a right to the use and enjoyment of the benefits to be derived therefrom, as it passes through his own land; but as this right is common to all through whose lands it flows, it follows that no one can wholly destroy

or divert it, so as to prevent the water from coming to the proprietor below; nor can a lower proprietor wholly obstruct it, so as to throw it back upon the mills or lands of the proprietor above. We, of course, now speak of rights at common law, independent of any modification thereof by statute. But one of the beneficial uses of a watercourse, and in this country one of the most important, is its application to the working of mills and machinery; a use profitable to the owner, and beneficial to the public. It is therefore held, that each proprietor is entitled to such use of the stream, so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress of improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land, on the same stream, above and below. This last limitation of the right must be taken with one qualification, growing out of the nature of the case.

The usefulness of water for mill purposes depends as well on its fall as its volume. But the fall depends upon the grade of the land over which it runs. The descent may be rapid, in which case there may be fall enough for mill sites at short distances; or the descent may be so gradual as only to admit of mills at considerable distances. In the latter case, the erection of a mill on one proprietor's land may raise and set the water back to such a distance as to prevent the proprietor above from having sufficient fall to erect a mill on his land. It seems to follow, as a necessary consequence from these principles, that in such case, the proprietor who first erects his dam for such a purpose has a right to maintain it, as against the proprietors above and below; and to this extent, prior occupancy gives a prior title to such use. It is a profitable, beneficial, and reasonable use, and therefore one which he has a right to make. If it necessarily occupy so much of the fall as to prevent the proprietor above from placing a dam and mill on his land, it is *damnum absque injuria*. For the same reason, the proprietor below can not erect a dam in such a manner as to raise the water and obstruct the wheels of the first occupant. He had an equal right with the proprietor below to a reasonable use of the stream; he had made only a reasonable use of it; his appropriation to that extent, being justifiable and prior in time, necessarily prevents the proprietor below from raising the water, without interfering with a rightful use already made; and it is therefore not an injury to him. Such appears to be the nature and extent of the prior and exclusive right, which one proprie-

tor acquires by a prior reasonable appropriation of the use of the water in its fall; and it results, not from any originally superior legal right, but from a legitimate exercise of his own common right, the effect of which is, *de facto*, to supersede and prevent a like use by other proprietors originally having the same common right. It is, in this respect, like the right in common, which any individual has, to use a highway; whilst one is reasonably exercising his own right, by a temporary occupation of a particular part of the street with his carriage or team, another can not occupy the same place at the same time.

But such appropriation of the stream to mill purposes, upon the principles stated, gives the proprietor a prior and exclusive right to such use only so far as it is actual. If, therefore, he has erected his dam and mill, with its waste ways, sluices, and other fixtures necessary to command the use of the water to a certain extent, and there is a surplus remaining, the proprietor below may have the benefit of that surplus. If he erects a dam and mills, for the purpose of using and employing such surplus, he is, as to such part of the stream, the first occupant, and makes the first appropriation. As to that, therefore, his right is prior and exclusive. And although the proprietor above might, in the first instance, have raised his dam higher, keeping within the limits of a reasonable use, yet after such appropriation by the proprietor below, he can not raise his dam and take such surplus; because, as to that, the lower proprietor has acquired a prior right. So the proprietor above may, in like manner, make any reasonable use of the stream and fall of water which he can do consistently with the previous appropriation of the proprietor below. If, with a view of gaining an advantage to his mill, in low stages of water, which may occur perhaps during the greater part of the year, he places his mill so low that, in high stages of water, the dam below will throw back water on his wheels, he may do so if he choose, because he thereby does no injury to any other proprietor. But if he sustains a damage from such back water, it is a damage resulting from no wrong done by the lower proprietor, who had previously established his dam, and it is an inconvenience to which he subjects his mill for the sake of greater advantages; and he has no cause to complain.

Another consequence from this view of the rights of successive proprietors to the use of the fall of water, on their respective lands, is this; that where one has erected a dam and mill on his own land, to a given height, and thereby appropriated as much

water as he has occasion for, and there is still a surplus, he has the same right as any other proprietor to appropriate that surplus. If, therefore, before any other person has erected a dam above him or below, so near as to be injured by the change, he elects to appropriate the surplus, or a part of it, he may either raise his dam higher, and thus create a greater head above, or place his wheels lower, so as to discharge the water at the race at a lower level, and thus appropriate to himself such surplus water and power of the stream. In regard to such surplus, he will still be the first occupant.

One other consideration of a general nature, applicable to this subject, it may be proper to advert to. It is obvious that these rights to the use and power of flowing water, whether it be the original right belonging to each successive proprietor to the flow of the water in its natural channel over his own land, or the same right modified by actual appropriation, may be granted away, or acquired, or may be limited, enlarged, or qualified, by grant from the proprietor in whom either of them is vested, or by that exclusive, adverse, and continued enjoyment which is regarded in law as evidence of a grant. If, therefore, one has enjoyed a particular use of the stream and water, or water power, for a period of twenty years, even though such use would not have been warranted by his original right to the natural flow of the stream—as by diverting it, or raising it unreasonably high, or otherwise—he will be presumed to do it by virtue of a grant from all those whose rights are impaired by such use; and thus his right to continue so to use it will be established. But if he shall thus exceed the equal, common, and original right, thus belonging to him as a proprietor, and not justify such use by grant or prescription, it will be deemed a disturbance of the rights of those whose beneficial use and power of the stream are thereby diminished.

Supposing these principles to be well founded, let us proceed to apply them to the present case. The plaintiff is the owner of the upper mill, and he claims it under Wilson, who took it under a deed from Hall and others, who were, at the time, proprietors of the lower mill. It is then argued, that if the proprietors of the lower mill ever had a right to keep up their dam to the height at which it stood at the time of this conveyance, it was an easement; that it was extinguished by unity of ownership; that consequently when they conveyed their upper mill, without reserving an easement anew for their lower mill, the easement was gone.

There is some danger of being misled by names, and by analogies between things which are alike in many respects, but not in all. The right to the use of flowing water is, in many respects, like an ordinary easement, but not in all. The right to the use of the flow and fall of the water on the land of the proprietor is not an easement, it is inseparably connected with and inherent in the land, is parcel of the inheritance, and passes with it. The right to have the water flow to one's land over that of the upper proprietor; and to flow from it over the land of the lower proprietor, is more like an easement, because it is a right to some benefit in the estate of another. But it does not necessarily follow that, like a common easement, it is extinguished by unity of ownership between the dominant and the servient tenants. The right to the use of the water is inherent in the land, and in each parcel; but it is a right *publici juris*, and subject to the rules of law securing to each successive proprietor the like use. If the owner of a large tract, through which a watercourse passes, should sell parcels above and below his own land retained, each grantee would take his parcel with a full right, without special words, to the use of the water flowing on his own land, as parcel, and subject to the right of all other riparian proprietors to have the water flow to and from such parcel. There is no occasion, therefore, for the grantor, in such case, to convey the right of water to the grantee, or reserve the right of water to himself, in express words; because, being inseparable from the land, and parcel of the estate, such right passes with that which is conveyed, and remains with that which is retained. Treating the right as inherent in the land, attaching to each parcel through which the stream passes, and the right to have water run to and from the land of each proprietor, over that of all others, as an easement or service, each parcel is, in turn, a dominant and servient tenement; dominant, to secure the proprietor's own right, and servient, to secure the rights of others. If, therefore, such easement is extinguished by unity of ownership, it is created anew by every new division or severance of ownership; and this consequence necessarily results from the nature of their rights. These principles arise from the nature of the inherent and original rights of proprietors to the common and equal use of the flow of a stream; but they apply, with equal force, to the modified rights of owners in the same stream, as acquired and appropriated by actual, prior, reasonable use and enjoyment.

The right, then, which Hall and others, at the time of their

conveyance of the upper mill to Wilson, had in the lower mill, and in the flow and fall of the stream, as modified by an appropriation by means of the dam and fixtures then established, was not a mere easement which had been extinguished by unity of ownership, but was parcel of the estate; and no part of it would pass by their deed of the upper estate to Wilson, without express words. The deed from Hall to Wilson—and those of the other tenants in common are substantially like it—is as follows: “One fourth undivided part of a certain tract or parcel of land, situated in Medway” (described), “together with one fourth undivided part of the privilege of water, creek, factory, saw-mill, dwelling-houses, and other buildings situate on the premises, and of the water-wheels, main gears, main drums, connected with the said factory and saw-mill, and of all the privileges and appurtenances thereunto belonging.”

This deed certainly conveys nothing in terms, but the mills and mill privileges, and the land over which the stream passes. Does it, by implication, extend further? If we are right in the principles stated, then a deed of land over which a watercourse passes will convey the right of the grantor as it then actually exists. If it be a stream wholly unoccupied, the grantee will take it, with a right to make a reasonable appropriation of the use of the whole stream. If it has been partially appropriated, he will take the land and watercourse, with a right to such use as can be made of it consistently with the right of other riparian proprietors, modified by their prior rightful appropriations. If the stream have been so fully occupied that the grantee can not raise his dam without throwing back-water upon the proprietor above, nor require the proprietor below to remove his dam, or reduce its height, because he has only exercised his just right of appropriation, then the grantee takes the land with the right to the flow and power of the water, as it then exists, on the land conveyed, and no more. Such appears to us to be the effect and legal operation of the deed above stated, so far as it regards the estate next below, which alone is now in question. The removal or reduction of the grantor's dam below, although it might increase the power and value of that above, was not necessary to the use and beneficial enjoyment of the estate granted; and no implication arises from that consideration. We can see nothing to extend the operation of this deed beyond the plain import of its terms, which was, to carry the land, mills, and water power, as it was then modified and appropriated by the dam below.

And we think the same answer applies to the argument drawn from the qualified covenant of warranty by the grantors, against all incumbrances brought upon the premises by them. The right to the use of the water below the granted premises, as modified by the appropriation previously made for the lower mill, was not, in legal contemplation, an incumbrance, but rather in the nature of parcel of such lower estate. One mode of testing this is, to inquire what would have been the operation of a general covenant of warranty, in this deed, against incumbrances, if the lower mill, with the rights of water appropriated to it by the existing dam, had been owned by a third person. Would the existence of the lower dam, with the existing right of raising water by it to the height at which it then stood, have been an incumbrance for which the grantors would be liable on such covenant? We think it would not. So we think this qualified warranty against incumbrances brought on the estate by themselves was not broken; because their maintaining their lower dam, to the height to which the water had been appropriated for its use, was not an incumbrance upon the estate granted.

The next claim of the plaintiff is this; that he had a right, founded upon the usage and practice of his grantors, to open the waste-gates of the middle dam, and thereby relieve his own mill from back-water; and that the defendant, by taking down the middle dam, and erecting a new dam further down the stream, had either prevented him from the exercise of this right, or rendered the exercise of it more onerous and expensive. The court are of opinion, that this claim can not be sustained. At the time of the practice relied on, the grantors were owners of both mills, and might favor one at the expense of the other, as the exigencies of their business might require, or at their own mere pleasure. But no right could be founded on such practice; because it was not adverse. When the estates were severed, and the rights of the respective proprietors became adverse, they stood upon the same footing as if no such usage had existed. The damages, therefore, which were given by the jury, for the violation of this supposed right, must be deducted from the verdict. The removal of the dam of the defendant some hundred feet lower down the stream, if it made the same appropriation of the stream as was made by the mill and dam, as they stood before, and no larger, was not an injury to the plaintiff, but was a just exercise of the defendant's own right.

But, for the reasons already given, the court are of opinion, that the defendant had no right to erect his new dam higher than

his old one, so as to appropriate an increased portion of the stream to his own use, and thereby set back-water upon the mill-wheels of the plaintiff. The jury having found that he had so raised his dam, to the injury of the plaintiff, and assessed damages therefor separately, we think the verdict must be amended, so as to stand as a verdict for the latter sum only, and that judgment be rendered thereon for the plaintiff.

RIGHT OF RIPARIAN PROPRIETOR TO USE OF WATER flowing through his land: See the prior cases in this series cited in the note to *Evans v. Merriweather*, 38 Am. Dec. 106-111. In *Hoy v. Sterrett*, 27 Id. 313, it was held that priority of occupation did not confer such an exclusive right in a stream as to enable a riparian proprietor to maintain an action against a person erecting a mill and dam above his, by which the water was diverted from his mill, and a similar decision was made in *Platt v. Johnson*, 8 Id. 233.

THE PRINCIPAL CASE HAS BEEN CITED and approved by the Massachusetts courts to the effect that where two or more riparian proprietors have an equal right to appropriate the waters of a stream for a reasonable use, and where such appropriation by one necessarily excludes all others, the first appropriator will be protected in his rights, in *Gould v. Boston Duck Co.*, 13 Gray, 451; *Fuller v. Chicopee Mfg. Co.*, 16 Id. 44; *Smith v. Agawam Canal Co.*, 2 Allen, 357; *Pratt v. Lamson*, Id. 288; *Lowell v. Boston*, 111 Mass. 465. In *Parker v. Hotchkiss*, 25 Conn. 321, and *Keeney etc. Mfg. Co. v. Union Mfg. Co.*, 39 Id. 576, the question of the conflicting rights of riparian proprietors to the reasonable use of a stream flowing through their lands, came before the court. In each of these cases the plaintiffs relied upon prior appropriation as authorizing the use of the stream, which was sought to be upheld, and cited the principal case in support of their contention. In repudiating this doctrine, the court said in the latter case, page 582: "The case of *Parker v. Hotchkiss*, 25 Conn. 321, shows that it is not the law of Connecticut. In *Parker v. Hotchkiss* the plaintiff had made precisely the prior appropriation which the plaintiffs have made in this case, and had enjoyed it for more than fifteen years, and made the same claim which is now under consideration. Judge Waite, giving the opinion of the court, says: 'It is difficult to see on what ground this claim can be maintained so long as the plaintiffs in the use of their mill and water privilege did not invade any rights of the defendant.' We are not, however, prepared to say that such prior appropriation, especially if of long continuance, may not be taken into consideration as one of the many elements which enter into the question of fact, whether in a given case a detention of the water above, which interferes with an existing use and appropriation of it below, be or be not reasonable. It is enough for the purpose of the present case to say that it is not a controlling circumstance, and certainly not in point of law decisive."

UNION BANK v. WILLIS.

[8 METCALF, 504.]

ONE WHO WRITES HIS NAME ON THE BACK OF A PROMISSORY NOTE, prior to delivery, is an original promisor, and a failure to demand payment of such person, at the maturity of the note, will discharge an indorser.

DEMAND OF PAYMENT ON A PROMISSORY NOTE executed by several makers, not partners, must be made on all in order to charge an indorser.

ASSUMPSIT, by an indorsee of the following note, against the indorser: "August 8, 1843. For value received, I promise Tilley Willis, to pay him, or order, \$350, in four months from date. T. D. Thompson." On the back of the note was written the name of B. L. Mirick & Co., and following it the name of the defendant. The further facts appear in the opinion.

Clarke and Kingsbury, for the defendant.

White, for the plaintiff.

By Court, HUBBARD, J. It is admitted that the note was not presented for payment to Mirick & Co.; and the question is, whether the omission to do it discharges the indorser. If the subject now brought before us were a new one, we should hesitate in giving countenance to such an irregularity, as to hold that any person whose name is written on the back of a note should be chargeable as a promisor. We should say, that a name written on the paper, which name was not that of the payee, nor following his name on his having indorsed it, was either of no validity to bind such individual, because the contract intended to be entered into, if any, was incomplete or within the statute of frauds; or that he should be treated, by third parties, simply as a second indorser; leaving the payee and himself to settle their respective liabilities, according to their own agreement. But the validity of such contracts has been so long established, and the course of decisions, on the whole, so uniform, that we have now only to apply the law, as it has been previously settled, in order to decide the present suit.

The first case of this description, of which any mention is made in the reports, is that of *Sumner v. Parsons*, tried before this court in Lincoln county, July term, 1801. The facts were these: "Parsons wrote his name on a paper and gave it to John Brown, but there was no evidence of the intent, or of any connection in business between them. Brown made a note on the other side, payable to Jesse Sumner or order, on demand, with interest, and signed it, and thirty days after made a partial payment on it. Sumner then got a writing in these words over the name of Parsons: 'In consideration of the subsisting connection between me and my son-in-law, John Brown, I promise and engage to guarantee the payment of the contents of the within note, on demand.' And he sued Parsons, declaring on the promise, specially stating it, and the note, but did not aver

any demand on John Brown, or notice to Parsons. In two trials in the supreme judicial court, it was held that Parsons was liable, and that Sumner had a right to fill the indorsement so as to make Parsons a common indorser of the note, with the rights and obligations of such, or a guarantor, warrantor, or surety, liable in the first instance, and in all events, as a joint and several promisor would be:" Amer. Prec. Declarations, 118. Mr. Dane, who cites it in his abridgment, vol. 1, 416, 417, remarks, that "this case was carried as far as any case had gone, and on the review the court was not unanimous; and it has since been questioned;" and we have no doubt with good reason; for the holder of the paper, having himself set out the contract by the words written over the name of the defendant, should have been held by its terms, and the legal effect should have been given to the material word "guaranty." And in that view of the contract, the promise of Parsons was only to pay after a demand upon Brown for payment and a refusal by him, and of which Parsons should have had notice. But the court must have construed the writing as constituting him an original promisor, and so bound, absolutely, without notice. And in our apprehension, the writing of the guaranty over the name of Parsons ought not to have been held as an act obligatory on him; but he should have been treated, if held at all, as an indorser of the note, and, as such, subject to the liabilities, and entitled to the notice, of an indorser: See *Beckwith v. Angell*, 6 Conn. 325, opinion of Hosmer, C. J.

The next case which came before the court was that of *Josselyn v. Ames*, 3 Mass. 274. By the report, it appears that John Ames was indebted on note to the plaintiff, who demanded security, and John offered his brother Oliver as surety, who was accepted. John then made a note to Oliver, not negotiable, and Oliver put his name on the back in blank. The plaintiff received it and gave up his former note, and afterwards wrote over the defendant's name the same words as in *Sumner v. Parsons*, with this additional clause: "and in consideration of receiving from Elisha Josselyn a note of the said John of the same amount." The court held that the plaintiff could not recover in that action, but might cancel the words written, and substitute, "For value received, I undertake to pay the money within mentioned to Elisha Josselyn," and upon such an indorsement, might maintain an action upon the facts reported. In what light the court held the defendant, does not distinctly appear; but we presume as an original promisor, from the manner in

which the case of *Sumner v. Parsons* is spoken of: "The guarantor in that case," they say, "was not the promisee, but a stranger, who warranted the payment to him. He can not himself warrant to a third person payment of a note made payable to himself and not negotiable."

The next reported case is that of *Hunt v. Adams*, 5 Mass. 358 [4 Am. Dec. 68], which was *assumpsit* on a note given by Chaplin to Bennet, under which the defendant wrote, "I acknowledge myself holden as surety for the payment of the demand of the above note. Witness my hand. Barnabas Adams." This cause was much considered, and the court ruled that the defendant, Adams, was to be charged as a promisor, and that his holding himself as surety did not abridge or affect the plaintiff's rights, but only was evidence, as between the promisor and himself, that he had signed for his accommodation. Other cases between the same parties, on similar notes, afterwards arose, and were decided in the same manner: S. C., 6 Id. 519. Immediately after, occurred the case of *Carver v. Warren*, 5 Mass. 545. That was on a note made by one Cobb to the plaintiff, and on the back of which the defendant wrote his name; and the plaintiff filled the indorsement, and declared upon it as his promise. The defendant demurred to the declaration, on the ground that this was but a promise to pay the debt of another, and was void for want of consideration. But the court held that, by the pleadings, each promised to pay the same sum, and that the defendant's promise did not import any guaranty or collateral stipulation; and that if the defendant had indorsed as guarantor, and the present indorsement was filled up without his consent, or any authority from him, he should have pleaded the general issue, and on the trial he might have availed himself of this defense. And so the plaintiff had judgment on the demurrer. The case of *Hemmenway v. Stone*, 7 Mass. 58 [5 Am. Dec. 27], followed. There the note ran, "I promise to pay F. M. Stone or order," and was signed, B. Chadwick; and below was signed by the defendant. The court held that it was a joint and several note, like the case of *March v. Ward*, Peake's Cas. 130. See also Bayl. on Bills, 2d Am. ed., 44.

The next case was *White v. Howland*, 9 Mass. 314 [6 Am. Dec. 71], which was on a note payable by one Taber to the plaintiff, and on the back of it was written "for value received, we jointly and severally undertake to pay the money, within mentioned, to the said William White. I. Coggeshall, Jr., Jno. H. Howland." The court held that this undertaking was within the

principle settled in *Hunt v. Adams*, 5 Id. 358 [4 Am. Dec. 68], and was the same as if the party had signed his name on the face of it; and that he was well charged as a several original promisor. The case of *Moies v. Bird*, 11 Id. 436 [6 Am. Dec. 179], which succeeded, is substantially like the present. A note was made to the plaintiff, and signed by Benjamin Bird, and the defendant signed his name in blank on the back of the note. The court say, the defendant "leaves it to the holder of the note to write anything over his name which might be considered not to be inconsistent with the nature of the transaction. The holder chooses to consider him as a surety, binding himself originally with the principal; and we think he has a right so to do. If he was a surety, then he may be sued as an original promisor."

In the case of *Baker v. Briggs*, 8 Pick. 180 [19 Am. Dec. 311], which was an action to recover the amount of a promissory note made by one Ryan to the plaintiff, the name of the defendant, Briggs, was written on the back of it, and the court say that, according to several decisions, it was right to declare against him as promisor, though he stood in the relation of surety to Ryan, who signed the note on the face of it. The case of *Chaffee v. Jones*, 19 Id. 260, was *assumpsit* on a note signed by Israel A. Jones, as principal, and Eber Jones and E. Owen & Sons, as sureties, by which they jointly and severally promised to pay the president, etc., of the Housatonic Bank, or their order; and the plaintiff put his name on the back of the note, in blank. The plaintiff was called upon, after the neglect of the makers, and he paid it to the bank. The court held that where one, not a promisor, nor indorser, puts his name on a note, meaning to make himself liable with the promisor, he is to be regarded as a joint promisor and surety. He is not liable as indorser, for the note is not negotiated, nor a title made to it, through his indorsement; nor as guarantor, there being no distinct consideration; but he means to give security and validity to the note by his credit and promise, and it is immaterial, for this purpose, on what part of the note he places his name. So in *Austin v. Boyd*, 24 Id. 64, where the defendant's name was, in like manner, on the note, it was held that the party, by thus putting his name on the back, makes himself an original promisor. He intends by it to give credit to the note.

The case of *Samson v. Thornton*, 8 Metc. 275 [37 Am. Dec. 135], was *assumpsit* on a note made by Benjamin Russell to the plaintiff, and was indorsed by the defendant, Thornton; and

the declaration charged him as an original promisor. The court there ruled that the defendant, not being the payee of the note, must be held to stand in the character of an original joint promisor and surety. The case of *Richardson v. Lincoln*, 5 Id. 201, is of the same type. There the court held that the defendant, not being payee, but having put his name, in blank, on the note, must be considered as an original promisor and surety, if he put it on simultaneously with the promisor, as an original contractor. See also *Sumner v. Gay*, 4 Pick. 811.

The same questions have arisen in New York, in various cases, and have been decided in a similar manner. They will be found cited in Story on Notes, secs. 59, 472-480, where the subject is fully discussed, and the authorities examined. To hold the party, however, as promisor, where the name alone is written, it must appear that he made the promise at the time when the note itself was made; otherwise, he may either not be chargeable at all, or be chargeable as surety or guarantor, according to the facts proved: *Carver v. Warren*, 5 Mass. 545; *Tenney v. Prince*, 4 Pick. 885 [16 Am. Dec. 847]; *Baker v. Briggs*, 8 Id. 180 [19 Am. Dec. 311]; *Oxford Bank v. Haynes*, Id. 423 [19 Am. Dec. 334]; Story on Notes, secs. 473, 474; *Beckwith v. Angell*, 6 Conn. 315. But that the promise was made at the same time with the note, is a fact which is to be presumed when the note is in the hands of a *bona fide* holder, and nothing is shown to the contrary. And in the present case, the note was offered to the plaintiffs for discount, by the maker himself, with the names of Mirick & Co. and Willis on the back of it; showing it, therefore, to have been an original undertaking on their part.

It was contended, in the argument, that Mirick & Co. were merely sureties, and that the plaintiffs had a right to treat them as such, and therefore were not bound to demand payment of them as makers, as a necessary step to enable them to charge the indorser; the relation of promisor, surety, and guarantor, being distinct. There is, unquestionably, a distinction between these several undertakings; and always so in regard to a mere guarantor. But as to the subsisting relations between a principal and surety, they rarely affect the contract between the creditor and surety. A man may be equally a surety and an original promisor; as where the promise is, I, A. B., as principal, and I, C. D., as surety, promise to pay; or where the party signs, and adds to his name the word surety. This does not make him the less a promisor. It only defines the relation between him and his co-promisor; and as promisor, the neces-

sity of a presentment to him is not dispensed with, if the intention of the holder of the note is to charge the indorser. It is not for the holder to choose in what character he will consider the party who has put his name on the note; but he must treat him as sustaining that legal relation which the facts establish. If he put his name on the note at the time it was made, like the case at bar, he is a promisor; if after the making of the paper, he is a surety or a guarantor, according to the agreement upon which he gives his signature. The fixing of the relation of the party, when he enters into the contract, is necessary for the protection of holders, and for guarding the rights of indorsers, whose liability is conditional. If it were held otherwise, I do not well see how such contracts could be supported against the objection of being void as within the statute of frauds. And, as it is, I consider these engagements rather as exceptions to the statute, than in any other light, and as growing out of, or rather engrafted upon, the law merchant applicable to regularly drawn bills of exchange and promissory notes. Upon this view of the law, as drawn from the various cases, we consider Mirick & Co. to have been joint and several promisors with Thompson, and liable in like manner with him.

The demand, in this case, was made on Thompson, the signer of the note, and notice was given to Mirick & Co. and to Willis, as indorsers; and it is now contended, by the plaintiffs, that if it should be held that Mirick & Co. are joint and several promisors with Thompson, and not indorsers, then the demand on Thompson is, in law, a demand on them also; and such demand being proved, that the indorser, on due notice, will be bound.

The precise question here presented, we believe, has not been decided in any reported case. If the joint and several promisors are to be considered in the light of partners, then a notice to one must be esteemed a notice to all, as partners are but one person in legal contemplation; each partner, acting in such capacity, being not only capable of performing what the whole can do, and of receiving that which belongs to all, but by such acts necessarily binding all the partners. It follows, therefore, as an incident to such joint relations, that all the partners are affected by the knowledge of one. But in respect to mere joint and several promisors on a note, there is not such absolute community of interest between them, nor such necessary connection with each other, as to constitute them partners. The relationship is confined to the present specific liability of a joint and several promise, and which can not be extended by the act of

one, so that his conduct shall necessarily bind the other. As between themselves, one promisor may be a mere surety, and the other the debtor; one surety may have received security for lending his name, the other not. Or, if there are three joint and several promisors, two may be sureties, and the other the principal debtor, although the fact may not appear on the note.

As the incidents, then, of a partnership do not attach to such a limited joint liability, there being neither a community of interests, nor joint participation of profit and loss, the fact of knowledge on the part of the whole, from the actual knowledge of one, does not follow as a presumption of law; and a demand upon one is not therefore, in law, a demand upon the whole. If, then, the bringing home of knowledge to each, or proof of a demand upon each, is a fact necessary to be proved, in order to bind third persons, then such knowledge, or such demand on each, must be proved as any other fact.

A case arose in Connecticut, upon a note payable to two jointly, and by them indorsed in their individual names. One ground of defense was want of notice of non-payment; and notice was proved to have been given to one only. The court held, after a careful consideration of the case, that a notice to one laid no foundation for an action against both, as each payee must indorse it, in order to transfer the title: *Shepard v. Hawley*, 1 Conn. 367 [6 Am. Dec. 244]. This case, we think, involves and settles a principle similar to the one arising in the case at bar. And the supreme court of the state of New York strongly incline to a like view of the law, in *Willis v. Green*, 5 Hill, 234, where it was not necessary to decide the point. And Judge Story, who carefully considers the subject, in his work on notes, is of the same opinion: *Story on Notes*, secs. 239, 255.

To apply the law to the facts as proved in the case before us: Thompson and Mirick & Co. stand in the relation of joint and several promisors. Payment of the note was demanded of Thompson, but not of Mirick & Co. The defendant is an indorser, liable only upon legal notice of a demand upon the promisors, and a refusal by them to pay the note; and we are of opinion that he has a right to avail himself of this neglect to make demand on Mirick & Co., to discharge himself from his liability as indorser.

Verdict set aside, and a new trial granted.

ONE WHO WRITES HIS NAME ON THE BACK OF A NOTE at the time it is made is an original promisor: *Baker v. Briggs*, 19 Am. Dec. 311. See also the note to *Perkins v. Cullin*, 29 Id. 297, where this subject is examined at length, and the conflicting rules of the various states collected.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

MICHIGAN STATE BANK v. HASTINGS.

[1 DOUGLASS, 235.]

STATUTE ANNULLING A FRANCHISE IS VOID AS WITHIN THAT PROVISION OF THE FEDERAL CONSTITUTION declaring that "no state shall pass any law impairing the obligation of contracts" where no right of revocation was retained in the franchise.

STATE MAY SUE, BUT CAN NOT BE SUED IN ITS OWN COURTS UNLESS IT CONSENTS to submit itself to their jurisdiction. Remedy of a party upon a contract with the state is by an appeal to the legislature, who it is fair to presume will make provision for its full execution and do ample justice to the party with whom it may have contracted.

RECORD IS IN ALL CASES TO DETERMINE WHO ARE PARTIES TO A CASE.

EQUITY WILL GRANT AN INJUNCTION, ALTHOUGH THE STATE IS DIRECTLY INTERESTED in having the act done, upon a case showing an entire want of authority on the part of the officer about to do the act, and where the injured party would be left remediless.

EXCEPTION TO RULE, PROHIBITING A COURT OF CHANCERY FROM MAKING A DECREE, until all those who are substantially interested be made parties to the suit, exists where it is not in the power of the complainant to make them parties.

CLAUSE "SHALL INDEMNIFY AND SAVE HARMLESS," IN A DEED, IS A CONDITION SUBSEQUENT, and the property reverts to the grantor upon the failure of the grantee to perform the condition.

PARTY CAN NOT RECOVER UPON A COVENANT, OR BOND TO INDEMNIFY, unless he has been actually damaged. A mere allegation that the complainants are threatened with a suit at law upon a claim included in the indemnity, is not sufficient to justify a recovery, and hence is no breach of the condition of the bond.

WHERE AN AGREEMENT TO INDEMNIFY IS PART OF THE CONSIDERATION for sale of land, no lien attaches before a breach of the covenant to indemnify.

COURT OF EQUITY WILL NOT DEGREE A SPECIFIC PERFORMANCE OF A CONTRACT TO INDEMNIFY AND SAVE HARMLESS, before the party has been actually damaged.

WHERE A STATE, BY AN EXPRESS ACT, RATIFIES AN AGREEMENT MADE BY ITS OFFICERS, except a condition subsequent, contained therein, and takes possession of the property under such agreement, it is a ratification of the whole agreement, the exception being null and void, and is not a breach of that condition.

BILL in equity. Complainants were indebted to the state of Michigan, in 1839, in the sum of about five hundred thousand dollars, and stopped payment in February of that year. In February of the next year, the legislature passed an act authorizing the auditor general, state treasurer, and secretary of state to settle with the bank upon such terms as they might think equitable, but the bank refused to settle, unless the forfeiture of its charter, caused by its suspension of specie payments, was remitted. In March, 1840, another act was passed, declaring that if the bank would settle with the commissioners under the former act, and should resume specie payments on or before the first day of April, 1841, nothing done previously to that act should affect its chartered privileges. On the first of May, 1840, the complainants settled with the commissioners by an assignment of real and personal property amounting to about six hundred and thirty-three thousand five hundred and sixty-seven dollars and ninety-eight cents. An indenture containing the terms of settlement was executed by the commissioners and by the president of the bank, the material portions of which are stated in the opinion. Defendants demurred generally to the bill. The chancellor sustained the demurrer, and dismissed the bill. The complainants bring this appeal from the order of dismissal. The other facts sufficiently appear in the opinion.

Van Dyke and Harrington, in support of the demurrer.

Joy and Porter, *contra*.

By Court, WHIPPLE, J. The demurrer in this case is general, and puts in issue the right of the complainants to an answer upon the case made by the bill.

1. In support of the demurrer it is contended, that, by the "act to annul the corporate rights of certain banks and for other purposes," approved February 16, 1842 (State L. 1842, p. 56), the charter of the Michigan State Bank was unconditionally repealed, and that, therefore, the court below had no jurisdiction of the case, there being, in fact, no such corporation as the Michigan State Bank. Whether the complainants

had a legal existence after the date of this repealing act, must depend upon the validity of the act. A corporation is a franchise, which, in England, is created by royal charter or by act of parliament. In the United States, corporations are generally created by act of the legislature. By the civil law, corporate communities, intended to be permanent, could not exist unless confirmed by the sovereign: Brown's Civ. L. 101, 102. The power, therefore, of creating corporations, resides in the sovereign. In England, a corporation may be dissolved: 1. By act of parliament; 2. By loss of all its members, or of an integral part, by death or otherwise; 3. By the surrender of its franchises; and, 4. By forfeiture of its charter, through negligence or abuse of the privileges conferred by it. The authority of parliament to dissolve a corporation, results from the theory of the British constitution, which recognizes the omnipotency of parliament. But the legislative power of this state is abridged and controlled by the constitution of the United States, and by our own local constitution. Any legislative act contravening the provisions of either, would be absolutely void and inoperative. Does the act referred to contravene any provision of either the federal, or our state constitution? If this question was an original one, I should feel bound to give to the arguments of counsel the most careful and deliberate consideration; but if there is any one question more firmly settled than another, it is that "a private corporation, whether civil or eleemosynary, is a contract between the government and the corporators; and the legislature can not repeal, impair, or alter the rights and privileges conferred by the charter, against the consent, and without the default of the corporation, judicially declared and ascertained:" 2 Kent's Com. 306; *McCulloch v. State of Maryland*, 4 Wheat. 318; *Fletcher v. Peck*, 6 Cranch, 88; *State of New Jersey v. Wilson*, 7 Id. 164; *Terrett et al. v. Tylor*, 9 Id. 43; *Town of Pawlet v. Clark*, Id. 292. If the question was now open for discussion, it might well be doubted whether the mere grant of a franchise, as in the present case, was a contract within the true meaning and spirit of that provision of the constitution of the United States, which declares that "no state shall pass any law impairing the obligation of contracts." We might be permitted to look beyond the provision itself, into the reasons which led to its adoption. But we have before had occasion to remark that the decisions of the supreme court of the United States, upon all questions arising under the constitution, are final and conclusive. They must

bind the judgment, although the understanding may not always be convinced. If it were otherwise, the consequences would be disastrous in the extreme. We should have a constitution, it is true, but uncertainty and instability would be impressed upon it, and there would be jarring and discordant conflicts of decision between the federal and state judicial tribunals. I feel bound, therefore, to disregard the act repealing the charter of the Michigan State Bank. I must treat it as void and nugatory.

2. It is insisted that the state is the real party in interest, and that, for this reason, the court below had no jurisdiction of the case. The demurrer was sustained by the court below upon the sole ground that the state was, in fact, the party defendant: *Michigan State Bank v. Hastings*, Walk. Ch. 9. And as the chancellor gave no opinion upon the several other points raised by the case, and which it is understood were argued before him, it is fair to presume that he entertained a strong conviction of the correctness of his views upon this single question. This consideration alone has induced me to give to this point a very full and careful examination, the result of which has been the undoubting conviction, that, notwithstanding the state is directly interested in the event of this suit, yet this circumstance constituted no objection to the jurisdiction of the court of chancery, and that the demurrer can not be sustained upon this ground.

The principle is well settled that, while a state may sue, it can not be sued in its own courts, unless, indeed, it consents to submit itself to their jurisdiction. This is done in cases where the state claims something in opposition to a claim set up by an individual, and where the controversy depends upon the solution of legal principles involved in intricacy and doubt. These questions can be best determined by the judiciary; and an act of the legislature, conferring jurisdiction upon the courts in the particular case, is the usual mode by which the state consents to submit its rights to the judgment of the judiciary. The method, at common law, of obtaining possession or restitution from the crown, of real or personal property, is by what is termed a petition of right; and Blackstone states the general rule thus: "If any man has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as matter of grace, though not upon compulsion." 1 Bl. Com. 203. This is consonant to what is laid down by writers on natural and public law. Puffendorf says that, "a subject, so long as he continues a subject, hath no way to oblige his prince to give him his due

where he refuses it; though no wise prince will ever refuse to stand to a lawful contract. And, if the prince gives the subject leave to enter an action against him upon such contract in his own court, the action itself proceeds rather upon natural equity, than upon the municipal laws. For the end of that action is, not to compel the prince to observe the contract, but to persuade him:" 2 Pet. Cond. 646. It is useless, however, to multiply authorities upon the question as to whether a state can be sued in its own courts. The only remedy for a party who has entered into a contract with a state, is by an appeal to the legislature, who, it is fair to presume, will, from motives of public duty, make provision for its full execution, and do ample justice to the party with whom it may have contracted; or else refer the case to the decision and judgment of the judiciary, by a special legislative enactment.

The real question for us to determine is, what is to be understood by the rule, admitted by both parties to be well established, that a state can not be sued in its own courts; or, in other words, that a suit can not be instituted against a state in its own courts. On the part of the defendants it is contended, that, although the state is not, and could not have been made a party to the record, yet the bill, on its face, shows that the state is the party in interest; and this being the case, the court can no more take jurisdiction, than it could have done, had the state been made a party defendant to the bill, and appeared in that character upon the record. On the other hand, it is contended on the part of the complainants, that in cases where jurisdiction depends upon the party, it is the party named in the record; and that the court will not, upon a question of jurisdiction, stop to inquire as to the interest of third persons, not named in the record, and who may be affected by the judgment or decree.

Can it be said that a person is sued, or that a suit has been instituted against a person, when such person is not named as a party defendant in the proceedings in a cause, and does not appear in that character upon the record? I apprehend not. Can a person, in a suit at law, be considered as a party defendant, unless his name appears as such in the writ, declaration, and other pleadings filed in the orderly and regular course prescribed by law for conducting suits, and the practice of courts? He certainly can not. Can a person be considered as a party defendant in a suit in chancery, unless he is made such party in the bill, and in the process by which defendants are legally brought into court? I think not. I have in vain searched for

a case in the English books, where a person has been regarded as a party to a suit, who is not made one by the proceedings in the case, and does not appear as a party in the record. The record in all cases is to determine who are parties to a case. In this case nothing appears on the record to show that the state is, in a legal and technical sense, a party defendant. But, it is said that the interest of the present defendants is merely nominal, and that the state is the real party in interest, and of consequence the real party to the record. The determination of this question must depend upon the facts stated in the bill, and the law arising upon those facts. It may be that this assumption of counsel is not warranted by the law and the facts. It may turn out, that, in point of law, the state are not exclusively interested in the case; that they have no rightful interest in the subject-matter of this suit; and that the present defendants are not merely nominal, but real parties in interest. But, before entering upon an extended examination of these questions, let it be assumed that the state has a direct legal interest in the subject-matter of the suit, and of course in its result. Does it necessarily follow that the court below, had no jurisdiction of the case?

The act of the seventeenth of February, 1842 (State L. 1842, p. 110), provides that the trustees therein named, should, in behalf of the state, take charge of the assets assigned by the Michigan State Bank, with power to lease, sell, or convey the same; and to pay into the treasury the moneys they may collect, to be used for the redemption of state scrip. The defendants, it is alleged in the bill, have now in their possession a large amount of the assets so assigned, and assume to hold and control the same by virtue of the act aforesaid. The right of the defendants, therefore, to hold, control, and dispose of the assets in question, is based upon that act. It is fair to presume, then, that the defendants will carry into effect its provisions: indeed, it is charged in the bill, that they have converted into money a large portion of the assets, and are disposing of the same from time to time. Now, suppose that the act under which the defendants claim the right to hold these assets, is nugatory and void. It would follow, as a necessary legal inference, that their possession is tortious and their acts void. Suppose also, that it should appear that the state, at the time the act referred to was passed, had, in point of law, no interest or property in those assets. Would it be contended, under such a state of things, that the preventive justice of the country could not be invoked by the complainants,

to stay the proceedings of the defendants, under the other averments contained in the bill? It could not be so contended, although the state were not a party to the record. The state need not be made a party to the record, for the reason that it would not, in the supposed case, have any legal interest in the subject-matter of the suit; but, if a legal interest did actually exist, it could not be made a party, for the reason that a state can not be sued. But shall it be said that there is no power to stay the arm of a state officer, acting under the authority of a law which is void? Must a party against whom the blow is aimed, await calmly until that blow is actually struck, and then seek a remedy, when that remedy would be utterly inefficient? Not so is the law. Upon a case made by a bill, showing the entire want of authority on the part of an officer to do an act, which act, when actually done, would leave the injured party remediless, a court of equity would grant its injunction to ward off the blow, although the state might be directly interested in having the act done.

To illustrate my views upon this point: the state claims title to a tract of land, rendered valuable, chiefly in consequence of the timber growing on it; suppose the state were to put the land in possession of an agent, with instructions to cut down the timber, and appropriate it to the uses designated by the state. Suppose one of its citizens, claiming title to the land under a grant from the state, should file his bill, showing himself the legal owner of the land, under a title derived directly from the state, and charging upon the agent of the state thus engaged under its authority, acts which amount to waste. Would a court of chancery refuse its interposition, because the defendants, who were committing the wrong and destroying the inheritance, were acting under the authority of the state, and because the state, who has an interest in the case, is not, and could not be made a party? I think not. But suppose after the timber has been actually cut and severed from the freehold, the claimant should bring replevin or detinue against the agent of the state, who was in actual possession of the timber. Would a court of law dismiss the cause for want of jurisdiction, upon proof of the fact that the defendant was acting under the authority of the state, and that the timber was the property of the state—that the state was directly interested in the event of the suit? I apprehend not, and that in this, as in other cases, the court would impose upon the defendant the necessity of establishing his defense by evidence. Again: suppose that instead of

treating the agent as a tortfeasor, the claimant should waive the tort and bring *assumpsit* for money held by him and arising from the sale of the timber, under the authority of the state. Would a court of law turn the plaintiff out of court because the state claimed the money? I apprehend not. I might multiply such illustrations indefinitely, but will content myself with one or two others, which are familiar to our courts, and of frequent occurrence. Suppose the state, having obtained a judgment against A., levies an execution, founded on the judgment, upon property owned by B.; the officer making the levy refuses to recognize the claim of B., who thereupon brings replevin for the property; the officer appears and justifies under the judgment and execution; but these show that the state is the real party in interest: would the court, for this reason, assume that they had no jurisdiction of the cause? I take it not. They would say to the officer that his process commanded him to take the property of the judgment debtor, and not of a stranger, and that his acts were void. An individual imports goods from a foreign country, which the collector of a port claims are liable to duty; this is denied by the importer. In order to obtain possession of the goods, however, he pays to the collector the amount of duty demanded, protesting against its validity; an action is brought by the importer against the collector, to recover back the money thus illegally demanded by the collector, and by him paid. It is quite clear, that, in such a case, the real parties in interest are the importer and the United States; and yet the courts are in the daily habit of entertaining jurisdiction in such cases. This illustration is a very striking one in favor of the position, that it is the party to the record, and not the interest of strangers to that record in the subject-matter of the suit, which determines the question of jurisdiction.

I am not, however, driven to the necessity of relying upon my own erring judgment in determining this question of jurisdiction, but draw support from a case of much celebrity which is familiar to the mind of every lawyer—I mean the case of *Osborn v. The Bank of the United States*, 9 Wheat. 738. I propose to examine that case somewhat critically, as I think it settles conclusively two questions decided in the case at bar. The Bank of the United States exhibited their bill in the circuit court of the United States, for the district of Ohio, praying that Osborn, the auditor of the state, might be restrained by injunction from proceeding against the bank, under an act of the state of Ohio, entitled "An act to levy and collect a tax from all banks, and

individuals, and companies and associations of individuals, that may transact banking business in this state, without being allowed to do so by the laws thereof." This act, after reciting that the Bank of the United States pursued its operations contrary to the laws of the state, enacted that if, after the first day of the following September, the said bank, or any other, should continue to transact business in the state, it should be liable to an annual tax of five thousand dollars on each office of discount and deposit; and that, on the fifteenth day of September, the auditor should charge such tax to the bank, and should make out his warrant, under his seal of office, directed to any person, commanding him to collect the said tax, etc. The bill, after reciting this act, stated that Osborn was the auditor of the state, and gave out, etc., that he would execute the said act. Upon this bill an order was made, awarding an injunction, etc., which was served on Osborn, and one Harper, on the eighteenth of September. The affidavit of the officer who served the injunction, stated that he served the same on Harper, while on his way to Columbus, with the money and funds on which the same were to operate, as he understood; and that the writ was served on Osborn, before Harper reached Columbus.

A supplemental and amended bill was afterwards filed in September, 1820, making new parties. The amended bill charged, that subsequent to the service of the injunction and subpoena, Harper, who was employed by Osborn to collect the tax, proceeded to the office of the bank, in Chillicothe, and took therefrom one hundred thousand dollars in specie and bank notes, belonging to, or in deposit with, the plaintiff; that this money was delivered to one Curry, who was the treasurer of the state, or to the defendant, Osborn, both of whom had notice of the seizure, and paid no consideration therefor, but received it to keep it a safe deposit; that Curry kept the money until he delivered it over to one Sullivan, his successor in office; and that neither Curry nor Sullivan, held the money in their character as treasurer, but as individuals. The bill prayed that Osborn, Curry, and Sullivan, in their official and private characters, and Harper, might be made defendants, and enjoined from using or paying away the money taken from the bank, and that the money be returned, etc. Curry filed his answer, admitting, that Harper delivered to him on the twentieth of September, 1819, the sum of ninety-eight thousand dollars, the amount of the tax levied upon the bank, and that he passed the same to the credit of the state as revenue, but in fact kept it separate

from other moneys until January or February, 1820, when the moneys in the treasury were seized upon by a committee of the house of representatives; that soon after he delivered over the said moneys to Sullivan, his successor, and took his receipt for the same. The answer of Sullivan, among other things, admits that he gave a receipt to the treasurer for the ninety-eight thousand dollars, and held it only as state treasurer. The cause was heard upon the bill, and the answers of Curry and Sullivan, and a decree was made, directing the restoration of the money to the bank; from which decree an appeal was taken to the supreme court of the United States.

The cause was argued with uncommon power and ability by eminent counsel, and a learned opinion was pronounced by the late Chief Justice Marshall. Among other grounds, the appellants claimed that the decree ought to be reversed, because, if any case was made by the bill proper for the interference of a court of chancery, it was against the state of Ohio, in which case the circuit court could not exercise jurisdiction. The reasoning of the chief justice upon this point is as follows:

"The bill is brought, it is said, for the purpose of protecting the bank in the exercise of a franchise, granted by a law of the United States, which franchise the state of Ohio asserts a right to invade, and is about to invade. It prays the aid of the court to restrain the officers of the state from executing the law. It is, then, a controversy between the bank and the state of Ohio. The interest of the state is direct and immediate, not consequential. The process of the court, though not directed against the state by name, acts directly upon it, by restraining its officers. The process, therefore, is substantially, though not in form, against the state, and the court ought not to proceed without making the state a party. If this can not be done, the court can not take jurisdiction of the cause." "The full pressure of this argument," says the chief justice, "is felt, and the difficulties it presents are acknowledged. The direct interest of the state in the suit, as brought, is admitted; and, had it been in the power of the bank to make it a party, perhaps no decree in the cause ought to have been pronounced, until the state was before the court. But this was not in the power of the bank. The eleventh amendment of the constitution has exempted a state from the suits of citizens of other states or aliens; and the very difficult question is to be decided, whether, in such a case, the court may act upon the agents of the state, and on the property in their hands."

"The state of Ohio denies the existence of this power, and contends, that no preventive proceedings whatever, or proceedings against the very property which may have been seized by the agent of a state, can be sustained against such agent, because they would be substantially against the state itself, in violation of the eleventh amendment of the constitution. The appellants admit, that the jurisdiction of the court is not ousted by any incidental or consequential interest which a state may have in the decision to be made, but is to be considered as a party when the decision acts directly and immediately upon the state, through its officers. If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced, where any person has been considered as a party, who is not made so in the record."

After citing many instances to show that the circuit courts of the United States would exercise jurisdiction in cases where a state had a real interest, notwithstanding the inhibition contained in the eleventh amendment of the constitution, the chief justice thus states the opinion of the court: "It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record." I think this case furnishes an unanswerable argument to the objection taken by the defendants to the jurisdiction of the court, grounded on the allegation, that the state is substantially the party in interest. For, if the circuit court of the United States, notwithstanding the positive restriction contained in the amendment referred to, could assume jurisdiction in a case where a state had a direct and immediate interest in the event of the suit, I know of no reason why a court of chancery may not, in a proper case, exercise a like jurisdiction where the restraint is imposed, not by the constitution or a positive law, but by the general principles of the public or municipal law. If, in the case from which I have freely quoted, the circuit court of the United States, upon the facts disclosed in the bill, could interpose, by injunction, and finally decree restitution of money in the actual custody of the treasurer of the state of Ohio, I know of no reason why the court of chancery in this state might not exercise jurisdiction in the present case, and grant the relief prayed for, if warranted by the facts stated in the bill, and which are admitted by the demurrer.

In the case last cited, the appellants claimed, also, that the appeal ought to be dismissed, because the case made in the bill did not warrant the interference of a court of chancery. "In

examining this question," the chief justice remarks, "it is proper that the court should consider the real case and its actual circumstances. The original bill prays for an injunction against Ralph Osborn, auditor of the state of Ohio, to restrain him from executing a law of that state, to the great oppression and injury of the complainants, and to the destruction of rights and privileges conferred upon them by their charter, and by the constitution of the United States. The true inquiry is, whether an injunction can be issued to restrain a person, who is a state officer, from performing any official act enjoined by statute, and whether a court of equity can decree restitution, if the act be performed. In pursuing this inquiry, it must be assumed, for the present, that the act is unconstitutional, and furnishes no authority or protection to the officer, who is about to proceed under it. This must be assumed, because, in the arrangement of his argument, the counsel who opened the cause, has chosen to reserve that point for the last, and to contend that, though the law be void, no case is made out against the defendants. We suspend, also, the consideration of the question, whether the interest of the state of Ohio, as disclosed in the bill, shows a want of jurisdiction in the circuit court, which ought to have arrested its proceedings." "The sole inquiry, for the present, is, whether, stripping the case of these objections, the plaintiffs below were entitled to relief in a court of equity, against the defendants, and to the protection of an injunction. The appellants expressly waive the extravagant proposition that a void act can afford protection to the person who executes it, and admit the liability of the defendants to the plaintiffs, to the extent of the injury sustained, in an action at law. The question, then, is reduced to the single inquiry, whether the case is cognizable in a court of equity." After reviewing the facts of the case, and the causes which justify courts of equity in interposing their authority for the protection of private rights, the chief justice proceeds to consider the objection made by the defendants in the court below, grounded on the fact that the party interested was not before the court, and that, therefore, the court could make no decree. Upon this point he says: "If the state of Ohio could have been made a party defendant, it can scarcely be denied, that this would be a strong case for an injunction. The objection is, that, as the real party can not be brought before the court, a suit can not be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree, unless all

those who are substantially interested, be made parties to the suit."

"This is certainly true, where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles, to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him, could his principal be joined in the suit. It is admitted, that the privilege of the principal is not communicated to the agent; for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It being admitted, then, that the agent is not privileged by his connection with his principal, that he is responsible for his own act, to the full extent of the injury, why should not the preventive power of the court also be applied to him? Why may it not restrain him from the commission of a wrong, which it would punish him for committing? We put out of view the character of the principal as a sovereign state, because that is made a distinct point, and consider the question singly as respects the want of parties. Now, if the party before the court would be responsible for the whole injury, why may he not be restrained from its commission, if no other party can be brought before the court?" Again: "Will it be said, that the action of trespass is the only remedy given for this injury? Can it be denied, that an action on the case, for money had and received to the plaintiff's use, might be maintained? We think it can not; and if such an action might be maintained, no plausible reason suggests itself to us, for the opinion, that an injunction may not be awarded to restrain the agent with as much propriety as it might be awarded to restrain the principal, could the principal be made a party."

This opinion establishes the following propositions: 1. That the rule which prohibits a court of chancery from making a decree, until all those who are substantially interested, be made parties to the suit, is inapplicable to a case, when it is not in the power of the complainant to make them parties. 2. If, in such a case, the defendant be a mere agent, and not privileged by his connection with his principal, and would be responsible in a court of law for the whole injury, the preventive power of a court of chancery may be applied to him in a proper case. 3.

That if an action of trespass would have lain against the defendants in that case, then case would also lie for money had and received.

And with respect to the circumstances which would authorize an injunction, the chief justice decides, that it will issue: 1. To restrain an agent from paying over to his principal, if that principal would not be amenable to the law. 2. In cases where the agent could not make compensation for the injury. 3. In cases where the injury would be irreparable.

Applying to the case before them, these principles, the supreme court of the United States determined that, as the defendants took and held the money in controversy, without authority, and would be liable for the whole amount in an action at law, the remedy by bill in equity was apt and proper; and decreed restitution. Believing then, that the case of *Osborn v. The Bank of the United States* establishes incontrovertibly the right of the court of chancery to take jurisdiction of the present case, notwithstanding the state is a party in interest; and that its jurisdiction is not ousted for the reason that the state is not, and can not be made a party; it only remains for us to determine, whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants. This brings me to an examination of the merits of the case.

3. Whether the complainants are entitled to relief, must depend upon the facts stated in the bill, and which are admitted by the demurrer. These facts are somewhat complicated, and it would savor of affectation not to admit that the law arising upon the facts is involved in some obscurity, arising, principally, from the misapplication of well-established general principles, by elementary writers, and in adjudged cases. To proceed understandingly, it becomes necessary to examine and determine, with accuracy, the true legal import of the agreement entered into between the complainants and the commissioners or agents appointed by the state, to effect a settlement with the Michigan State Bank, in order to define the legal rights of the parties to that agreement. By referring to the indenture, it appears that the bank, for the purpose of settling with the state, assigned to Eurotas P. Hastings, auditor general, Robert Stuart, state treasurer, and Thomas Rowland, secretary of state, all the interest in and to the property, real estate, choses in action, etc., mentioned and set forth in a schedule annexed to the indenture, and constituted the said Hastings, Stuart, and Rowland, or such other persons as the legislature might appoint, their attorneys,

to sell, convey, and alien, lease, assign, collect, secure, commute, and compromise the property and demands in the said schedule described, in their own names or in the name of the bank, ratifying and confirming all their lawful acts and doings. The bank also covenanted with the said commissioners, to grant to them, their agent or attorney, access to such books and papers connected with the property and demands aforesaid as might be in their possession, etc.

In consideration of which, the commissioners on their part agreed to receive the said property mentioned in the schedule annexed to said assignment, in full payment and satisfaction of all debts and liabilities of the bank to the state, and did, in and by said indenture, acquit and discharge the bank from all claims, debts, dues, and demands against them and in favor of the state, and from all liability thereon. The following clause then appears in the indenture: "And it is hereby understood by and between the parties of the first and second part, that the assignment of the property and effects contained in said schedule A., is made upon and subject to the express condition, that the state of Michigan shall indemnify and save harmless the party of the first part and their grantors, immediate and remote, from and against the claims and liabilities hereinafter specified, forever, viz.: a certain bond and mortgage executed by the party of the first part, to the Bank of Michigan, upon their banking-house and lot, this day conveyed by the party of the first part, to the auditor general, subject to said mortgage, upon which there remains unpaid the principal sum of eleven thousand two hundred and ten dollars; also a certain bond and mortgage executed by Lansing B. Mizner to James H. Wood, dated October 19, 1838, on a house and lot this day conveyed by the party of the first part, to the auditor general, subject to said mortgage, upon which the principal sum of one thousand five hundred dollars remains unpaid; also, a certain bond and mortgage, executed by Eurotas P. Hastings to William W. Miller, upon lots 8, 9, 54, and 55, in section 4 in the city of Detroit, this day conveyed by the party of the first part, to the auditor general, upon which the principal sum of ten thousand dollars remains unpaid; also, all and sundry claims by and in favor of attorneys and agents, for professional services and disbursements, in and about the collection and securing of all or any of the demands set forth in said schedule A., which have accrued, or may hereafter accrue, upon any collateral securities transferred to the state of Michigan, and more particularly set forth in schedule B., hereunto

annexed." Such was the agreement between the bank and the commissioners appointed by the state. That agreement may in short be thus stated. In consideration of a debt of five hundred thousand dollars, which the complainants acknowledge to be due by them to the state of Michigan, they actually assigned and conveyed to the defendants, the agents of the state, property appraised at the sum of over six hundred thousand dollars; but the assignment and conveyance was made by the complainants, upon the express condition, that the state should indemnify and safe harmless the bank from certain liabilities, etc., expressed in the condition.

Waiving the consideration of the question, as to the authority of the commissioners, to make the agreement, it purports on its face, to be an assignment, by the complainants, to the defendants, of certain real estate and choses in action, founded on a valuable consideration; but subject to a certain condition. What then is a condition, and what are its legal effects? Estates upon condition are such as have a qualification annexed to them, by which they may, upon the happening of a particular event, be created, or enlarged, or destroyed: 3 Kent's Com. 120; Co. Litt. 201. The following definition is more full and satisfactory: "A condition is a restriction, or a qualification annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantee does or omits to do a particular act, an estate shall commence, be enlarged, or defeated:" 2 Cru. Dig. 2. Littleton divides them into two classes: 1. Estates upon condition implied, or in law; and 2. Estates upon condition express or in deed: Litt., sec. 325. The condition in the case before us belongs to the second class, and is a condition express, or in deed. The right to annex a condition to a conveyance, results from the power of alienation; and this power of alienation is an incident to the right of property. If then, that condition be precedent, and the act upon which the estate depends be not performed, the estate does not vest; but if the condition be subsequent, the estate does vest, and will continue to vest until defeated by a failure on the part of the grantee to perform the condition annexed to the estate; or, in other words, until there is a breach of the condition. If, for instance, a person have an estate in fee subject to a condition, he may convey or devise the same, and the grantee or devisee will continue to hold as though no qualification had been annexed; but until the condition be performed, the estate is liable to be defeated; unless, indeed, the performance of the con-

dition become impossible, by the act of God, or of the individual who imposes it. "For if a condition annexed to lands be possible at the making of the condition, and become impossible by the act of God, yet, the estate of the feoffee shall not be avoided:" Co. Lit., sec. 334. "And so it is in case of a feoffment in fee with a condition subsequent that is impossible; the estate of the feoffee is absolute. And he that entereth for a condition broken shall be seised in his first estate, or of that estate which he had at the time of the estate made upon condition:" Id., sec. 325.

Having shown, 1. That there was in this case a condition subsequent annexed to the estate; and, 2. The effect of a breach of such condition; it only remains for me to inquire, whether there has been a breach of the condition annexed to the estate granted by the complainants to the defendants, and if so, whether the facts stated in the bill will warrant a court of equity in granting the relief prayed for; or, if there has been no actual breach of the condition, whether, under all the circumstances, a court of equity should hold the estate in the hands of the defendants, subject to the payment of the debts mentioned in the condition.

But before entering upon the discussion of this branch of the case, it may not be considered unimportant to refer to a few adjudged cases, to show how inflexibly courts have adhered to the principle laid down by elementary writers, that upon breach of a condition, the estate, whether real or personal, reverts to him by whom the condition was annexed. A. and B., tenants in common of land, sold the wood growing thereon, with a proviso that it should be taken from the land within two years. B. then conveyed his interest in the land to A. The purchaser of the wood transferred his right thereto to C., who had no notice of the proviso as to the time of taking it away. C. cut the wood, but did not remove it within two years. Held, that the property in the wood reverted to A., and that C. could not recover of him pay therefor, nor pay for cutting it: *Kemble v. Dresser*, 1 Mete. 271 [35 Am. Dec. 364]. S. and D. entered into a written contract, by which the former agreed to sell, and the latter to purchase, a canal boat for three hundred dollars, provided that amount should be paid by D. in freighting wheat and flour on the canal under the direction of S. Held a conditional sale, and that no property vested in D., which could be sold under a *fi. fa.* against him, until the purchase money was fully paid. Under a *bona fide* contract of this nature, the vendee is entitled to the possession of the thing sold for the purpose of paying for it in the manner stipulated; but it is to be thus possessed as the prop-

erty of the vendor until the condition of payment is fulfilled: *Strong v. Taylor*, 2 Hill, 326. Chief Justice Nelson, in delivering the opinion of the court, says: "The right of Dubois rested in contract and contract only, by virtue of which, he might, at a future day, acquire an interest in the property, but till the fulfillment of the condition, or payment of the purchase money, in the mode pointed out by the contract, nothing passed." The same doctrine is fully sustained by Mr. Justice Story in the case of *D'Wolf v. Babbett*, 4 Mason, 289; and by Mr. Justice Washington, in the case of *Copland v. Bosquet*, 4 Wash. C. C. 598. See also the case of *Lawrence v. Gifford*, 17 Pick. 366; and the case of *Haggerty v. Palmer*, 6 Johns. Ch. 437.

In the case last cited, it appeared that goods were sold in the city of New York, to be paid for in approved indorsed notes, and it was the usage in that city when goods were sold, for the vendor to deliver them to the buyer when called for, and to send for the notes. The vendee, after he had received the goods, and before he was called upon for the notes, according to the terms of the sale, stopped payment and assigned over the goods, with other property, to pay certain creditors. Held, by Kent, Chancellor, that the delivery of the goods by the vendors, was conditional; that the vendee was a trustee for them until the notes were delivered; and that the assignment by the vendee was voluntary and fraudulent, and did not defeat the equitable lien of the vendors. In *Hussey v. Thornton*, 4 Mass. 405 [8 Am. Dec. 224], it was held, that if A. contracts to sell certain goods to B., on a credit, with a condition that B. shall furnish a surety for the price, and delivers the goods without such surety furnished, but declaring that he should not consider them sold until the security should be given, the property remains in A., notwithstanding such delivery. These cases contain a full and ample recognition of the rule laid down in 2 Kent's Com. 497. I now refer to the case of *Gray v. Blanchard*, 8 Pick. 284, to show the strictness of the principle where conditions are annexed to a conveyance of real estate. "The demandant, being owner of a parcel of land with a dwelling-house thereon, adjoining, on the north, to land with a dwelling-house thereon belonging to his sister, facing to the south, conveyed to the tenant's grantor in fee simple, 'provided, however, this conveyance is upon the condition, that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises, within thirty years from the date hereof.' After the sister has conveyed her land

to a stranger, the tenant mortgages by deed reciting the foregoing provision, and afterward, while remaining in possession, makes windows in the north wall. Held, that the above clause was a condition, and that such breach of it worked a forfeiture of the estate, and gave the demandant a right to re-enter." The decisions are all based upon the general rule, "that when a man hath a thing, he may condition with it as he will;" and the duty of courts is to expound and give effect to all lawful contracts made between parties, and not to make contracts for them.

The question now recurs, has there been a breach of the condition annexed to the estate granted by the complainants to the defendants, for the use of the state? The bill alleges that the state has never paid, or in any way satisfied the bond and mortgage executed by the complainants to the Bank of Michigan, but has permitted the mortgage to be foreclosed, and the banking-house to be sold at a very great sacrifice, and much below its real value, and has refused to pay off and satisfy the balance of several thousand dollars due upon the said bond and mortgage, and that the complainants are threatened with a suit upon the said bond for the balance due thereon, by the owner thereof, which bond the state was bound and obliged to have paid long since; that the state is insolvent, etc.; and that they have, without avail, endeavored to induce the state to comply with the terms of the agreement entered into as aforesaid. I have already said that the words in the last clause of the agreement, import a condition; a condition imposed by the grantors. But the clause also imports a covenant or agreement on the part of the state to indemnify. Suppose, therefore, that no words had been employed creating a condition, could the complainants, in a court of law, upon proof of the facts stated in the bill, have maintained an action upon the covenant? I apprehend that they could not, for the reason that the facts proved would not establish a breach of the covenant; and, at law, there can be no damages without an injury. The mere allegation that the complainants are threatened with a suit at law upon the bond, to recover the balance that may be due on it, would be insufficient to justify a recovery. In other words, a party can not recover upon a covenant, or bond to indemnify, unless he has been actually damnified. There being, then, no actual breach of the condition by the state, the complainants could not sustain a suit at law, and for the same reason, the property assigned to the defendants does not revert to the complainants. "Condi-

tions subsequent (says Chancellor Kent, 4 Com. 129), are not favored in law, and are construed strictly, because they tend to destroy estates; and the rigorous exaction of them is a species of *summum jus*, and in many cases hardly reconcilable with conscience." See, also, Co. Lit. 205 b, 219 b, and 8 Co. 90 b. I do not of course mean to be understood as saying, that the exaction, in this case, would be unconscientious. Admitting, however, that there had been a breach of the condition on the part of the state, a court of equity would not lend its aid to divest an estate for the breach of a condition subsequent, although that aid will sometimes be extended to relieve against such a condition: 4 Kent's Com. 130. It is to be observed here, that the agreement on the part of the state, was not to pay, as is supposed in that portion of the bill last quoted. The allegation is, "that the state has refused to pay and satisfy the balance of several thousand dollars," etc., "which the state was bound and obliged to pay," etc.; but the agreement was simply to indemnify. If the agreement on the part of the state had been to pay, the case would have been stripped of many of the difficulties by which it is surrounded.

It follows, therefore, that if the complainants are entitled to any relief, that relief must be founded upon other facts disclosed in the bill, and not upon the ground that there has been a breach on the part of the state, of the last clause in the indenture. It is claimed that a court of equity has jurisdiction of the case, and power to grant the relief prayed for, on two distinct grounds. 1. It is contended that the vendor of land has a lien on the land for the amount of the purchase money, not only against the vendee himself, his heirs, and other privies in estate, but also against subsequent purchasers having notice that the purchase money remains unpaid. 2. That the court will compel a specific performance of a contract to indemnify and save harmless, although no damages have actually been sustained.

No principle is now better settled than that the vendee of lands becomes a trustee to the vendor for the purchase money, or so much as remains unpaid. 2 Story's Eq. 463, 464, 465. In such a case the trust is implied, and arises from what are called equitable liens, of which courts of equity alone take cognizance. Such liens exist independently of any express agreement, and courts of equity enforce them, on the principle that a person having gotten the estate of another, ought not in conscience, as between them, to be allowed to keep it, and not pay the consideration money. The Roman law declared the lien to exist

in natural justice; and this principle, which is now engrafted in the equity jurisprudence, both of England and this country, was borrowed from the civil law. By that law, the rule was equally applied to the sale of movable and of immovable property: *Id.* 408. In England, however, the lien is usually confined to cases of the sale of immovables, and does not extend to movables where there has been a transfer of possession. It is insisted that an equitable lien exists in this case, for the reason that the covenant on the part of the state to indemnify, constituted part of the consideration for the sale by the complainants of the property mentioned in the assignment. Admit this to be true, yet it is difficult to perceive how a lien can exist before a breach of the covenant to indemnify. It may be that a recovery can not be had against the bank by the person holding the bond, and if so, it is quite clear that no lien would exist. Whether a lien exists, then, must depend upon a contingency which may never happen. We are not to presume that a suit will be instituted on the bond; much less are we to presume that a recovery will be had. It will be time enough to enforce a lien, when that lien attaches, and it certainly cannot attach in the present case, unless the complainants are damnified. Equity will not raise a debt against the agreement of the parties, which agreement did not contemplate a debt or obligation until the complainants were damnified. The debt being raised, equity might direct the property assigned to the defendants to be held as security for its payment; or, in other words, consider the debt due by the vendee, as a debt due by the property. Courts of equity have applied the doctrine of equitable liens with great liberality, but I have in vain sought for a case which would justify the application of the principle to the present case. The whole argument of the complainants is based upon facts that are assumed, and not upon facts as they actually exist. There is no agreement on the part of the state to pay and satisfy the bonds and mortgages mentioned in the last clause of the indenture, but simply an agreement to indemnify. The legal liability of a covenantor in the first case depends upon no contingency—in the latter case it does. This distinction is obvious, and is recognized in all the adjudged cases on the subject. I shall forbear entering into an examination of those cases, as they have been fully considered in the opinion delivered by my brother Goodwin, in the case of *Wheelock v. Rice*, 1 Doug. 267. An equitable lien, therefore, does not exist, upon the facts disclosed in the bill of complaint in this cause.

But, secondly, can the court enforce the agreement to indemnify? It is well settled that "courts of equity will decree the specific performance of a general covenant to indemnify, although it sounds only in damages, upon the same principle, that the court entertains bills *quia timet*:" 2 Story's Eq. 145. The leading case in this country which asserts and indicates the jurisdiction of courts of equity in such cases, is *Champion v. Brown*, 6 Johns. Ch. 406 [10 Am. Dec. 343]. This case the counsel for the complainants considers directly in point, and as justifying the relief asked for in the present instance. Let us see how this view is sustained by the case. The bill was filed by Henry Champion and William L. Storrs; and the administrators and heirs of John Paddock, deceased, against John Brown and Jacob Brown, for the specific performance of an agreement, made on the twenty-ninth of August, 1816, by which Henry Champion and Lemuel Storrs agreed to sell and convey to Paddock nine hundred and fifty-two acres of land, for the sum of eight thousand dollars; five hundred dollars to be paid in cash, and the residue in six equal annual installments, with interest annually. Paddock died intestate, November 16, 1816, and his administrators and heirs, being unable to perform the contract, for want of personal assets, on the first of June, 1818, entered into an agreement with the defendants, by which the latter covenanted and agreed, "that they would take up and cancel" the contract made between Champion and Storrs, and Paddock, etc., by the first of August then next, or, in case that Champion, the survivor of Lemuel Storrs, should refuse to give up and cancel the said contract, then the defendants covenanted to indemnify and save harmless the administrators of Paddock, etc., from all damages, costs, charges, and expenses which they might sustain, or be put to, on account of the claims, covenants, and agreements in the said agreement contained. The administrators of Paddock covenanted, in their individual capacities, to pay to the defendants all the moneys owing to them from J. Paddock, deceased. Lemuel Storrs having died, all his interest in the contract became vested in William L. Storrs, one of the complainants. Soon after the agreement between the administrators of Paddock and the defendants, the latter entered into possession of the land, etc. The bill prayed for a discovery, and that the defendants might be decreed specifically to perform the agreement between Champion and Storrs and Paddock, and for their indemnity; the heirs offering to ratify and confirm the conveyance of the land to the defendants in fee, etc. The chan-

cellor, in giving his opinion, said, that the first and leading question was, whether the bill could be sustained by Champion and Storrs, as vendors, against the defendants, claiming by purchase under the vendee. The chancellor decided this question in the affirmative, and that the plaintiffs had a lien on the land for the purchase money.

The next question was, whether the plaintiffs, who were administrators of Paddock, were entitled to any remedy, under the bill, upon the covenant of indemnity. In considering this question, the chancellor remarked, that the administrators were not personally liable on the contract of their intestate; and, as they had averred they had no assets, it was not perceived how they could be injured, and that this assertion of theirs created the great difficulty on the point; and, after citing several cases to show that equity will decree the performance of a general covenant of indemnity, though it sounds only in damages, upon the principle on which the court entertains bills *quia timet*, he further remarked, that in the case before him, the defendants, by their covenant of indemnity, and purchase of the contract between Champion and Storrs and Paddock, undertook to relieve the estate of Paddock from the burden of that contract. This, said the chancellor, is the true intent and meaning of the agreement between the administrators and the defendants, and it is as just that they should be decreed to clear the representatives of Paddock, from the charge which they assumed for them, as it is that a principal debtor should exonerate his surety before suit brought, and not leave a cloud always hanging over him. After a very critical examination of the whole agreement between the administrators and the defendants, the chancellor seems to have arrived at the following conclusion: "That the defendants intended to stand in the place of Paddock (the original vendee), and to assume the payments to Champion and Storrs, with which the estate of Paddock stood charged;" that "this was the good sense and meaning of this covenant of indemnity." A decree was accordingly made that the administrators were entitled to a specific performance of the covenants on the part of the defendants, and to an assessment of damages for breach thereof.

The leading English case relied upon by the chancellor in support of his views, is *Ranelagh v. Hayes*, 1 Vern. 189. The facts in that case were as follows: "The Earl of Ranelagh assigned several shares of the excise in Ireland, to Sir James Hayes, and Sir James covenanted to save the earl harmless in respect to that assignment, and to stand in his place touching

the payments to the king, and other matters that were to be performed by him." The plaintiff suggested in the bill, that he had been sued by the king for twenty thousand pounds, and that the defendant ought to have paid it, etc. The lord keeper decreed that Sir James should perform his covenant, and that a master should report as often as a breach occurred, that the court might, if there should be occasion, direct a trial at law in a *quantum damnificatus*. The lord keeper compared it to the case of a counter-bond; where, although the surety is not troubled, yet at any time after the money became payable on the original bond, a court of equity will decree the principal to pay the debt.

These two cases, although differing in respect to the facts, were deemed to be governed by the same principles, and instead of supporting the views of the counsel by whom they were cited, go very far, I think, to show, that the present case does not fall within the principles laid down either by the lord keeper or Chancellor Kent. In the case of *Champion v. Brown*, the chancellor says, "that the defendants intended to stand in the place of Paddock, and to assume the payments to Champion and Storrs, with which the estate of Paddock stood charged," and that "such was the good sense and meaning of the covenant of indemnity." The case of *Ranclaugh v. Hayes* states that "Hayes was to stand in the place of the plaintiff, touching the payments to the king." The covenants in those cases, we are bound to presume, justified the construction put upon them; if so, it would be difficult to perceive, why, upon principle, the complainants were not entitled to the relief given them. But does the covenant in this case authorize us in saying, that the state intended to stand in the place of the bank, and assume the payments of the several bonds, etc., mentioned in the condition to the indenture? or that the state by the terms of the covenant was to stand in the place of the bank, touching the payments to the Bank of Michigan or holders of the bonds? I know of no rule that would justify me in putting such a construction upon the covenant in this case. We are not permitted to make a contract for the parties, by declaring that a covenant to indemnify means a covenant to pay. If the language of the covenant, taken in connection with the whole agreement, would warrant such a construction, we should feel bound so to construe it; but the language is plain: it admits of but one construction; and we can not without doing violence to the rules of law, give effect to what might have been the intention of the parties. We must judge of that intention by the agreement itself. But if we could

so construe the indenture as to intend that in point of fact the covenant to indemnify meant a covenant to pay, as was the case in *Champion v. Brown* and *Ranelaugh v. Hayes*, insuperable difficulties would be interposed in the way of granting the relief sought for. What in such a case is the mode of relief, and the measure of damages? The mode of relief is by a proceeding directly against the party who enters into the covenant. That party in the present case is the state, who is not and can not be made a party to the suit. The measure of damages, to be ascertained by a trial at law in a *quantum damnificatus*, would be the actual injury growing out of a breach of the covenant. How can such a trial be had without the proper parties? Again, it may be well doubted, whether in point of law, there is such a covenant on the part of the state as would authorize its enforcement in a court of equity. I have treated the case, thus far, as though the covenant was not inserted in the indenture as a condition annexed to the estate. I have considered it as though it did not, of itself, constitute the condition; and it may be questionable, whether, had it been a covenant to pay, instead of a covenant to indemnify, a court of equity would decree a specific performance. But the question does not necessarily arise, and no decision, therefore, is called for on this point.

It was urged in argument, that the state had, by a solemn legislative act, rejected the condition, and it was asked with emphasis, whether the state could thus reject the condition and still hold the property? The answer is, that the state can not reject the condition, and hold the property; and that a breach of the condition will make a forfeiture of the estate granted. But the declaration of the state, that it rejects the condition, does not, of itself, constitute a breach of that condition, any more than the declaration of an individual who had executed a bond conditioned for the performance of covenants, that he rejected the condition, would constitute a breach of such condition. It is not in the power of a legislature to convert, by a legislative enactment, a conditional estate, into an absolute one. Such an act would involve a violation of the constitution of the United States, and be pronounced nugatory and void. If a breach of the condition on the part of the state had been shown in the bill, I should have felt bound to treat the act directing the moneys arising from the sale of the assigned assets, to be appropriated towards the redemption of state scrip, as a violation of the vested rights of the complainants, and should have disregarded its provisions. For, a breach of condition once established, the state

is divested of all right to that property; it would at once revert to the complainants, and any act of the legislature appropriating that property to a public use, in a manner not recognized by the constitution or laws of the state, would be void.

Viewing the case in the light I do, it has become unnecessary to decide some questions raised by counsel in argument, and involving principles of vital interest. One point, however, may need a passing notice: I refer to the position assumed by counsel, that the legislature had a right to reject the condition annexed to the indenture, in the event that the commissioners exceeded their authority by agreeing to the condition. Whether there was an excess of power, or not, it is unnecessary to determine, and can have no influence on the ultimate decision of the rights of the defendants under the agreement. They had, as I have already intimated, the right to annex the condition. The state had the right, if there was no authority on the part of the commissioners, to repudiate their acts. This the state did not do. By acting for nearly two years upon the agreement—by exercising acts of ownership over the property, they affirmed the acts of their agents, whether those acts were originally binding and obligatory or not. But the act of the seventeenth of February, 1842, was a solemn act of recognition—one from which the state can not escape. That part of the act rejecting the condition, was a nullity; it is a declaration without any meaning. If it would not be competent for an individual to separate an estate from the condition annexed to it, it would not be competent for the state to do so. What would be the effect of such an act? It would be to separate two things which in their nature are inseparable. In the language of the law, the condition is annexed to the estate; it doth always attend and wait upon the estate; it is knit to it. For this court, then, to affirm that such a power is lodged in the legislature, would be to affirm that that clause in the constitution, which prohibits a legislature from passing an act impairing the obligation of contracts, is a mere nullity.

The conclusion, then, of my mind is, 1. That the estate granted by the complainants to the defendants, was upon condition; 2. That whether the commissioners on the part of the state had the authority or not to annex the condition, can not affect the legal rights of the complainants under the agreement; for the reason, 3. That the state has ratified and affirmed the acts of the commissioners, and is bound by the agreement made with the complainant; 4. That the condition in the last clause of the agreement was simply to indemnify; 5. That there has been no breach

by the state of that condition; and, 6. That that part of the act of the seventeenth of February, 1842, which rejects the condition, is a mere nullity, and of no efficacy in the law.

The decree of the chancellor must be affirmed.

GOODWIN, J., did not participate in the decision, the cause having been argued before he took his seat upon the bench

Decree affirmed.

CORPORATE CHARTER OR FRANCHISE IS A CONTRACT: See note to *Backus v. Lebanon*, 35 Am. Dec. 471, where prior cases in this series are collected.

A STATE CAN NOT BE SUED IN HER OWN COURT, unless there is an enactment of the legislature, providing the manner and in what courts she may be sued: *Divine v. Harvie*, 18 Am. Dec. 194.

THE PRINCIPAL CASE IS CITED IN *Sears, Adm'r, v. Smith*, 2 Mich. 246, to the point that the vendor of lands has a lien upon the estate sold, for the purchase money; and that in administering this branch of equity jurisprudence, courts regard the vendee in the light of a trustee to the vendor. The principles decided in the principal case are restated, explained, and affirmed in the case of *Michigan State Bank v. Hammond*, 1 Doug. 527. In the principal case the court held, that, admitting its jurisdiction, yet relief could not be extended to the complainants, for the obvious reason that there had, in fact, been no breach of the condition annexed to the estate granted by the complainants to the defendants. The bill in this case of *Michigan State Bank v. Hammond*, sets forth the same averments as the bill in the principal case (the parties in each case are the same), with the additional averment that the banking corporation has been sued on one of the liabilities indemnified against, and a judgment for nine thousand six hundred and ninety-nine dollars obtained against it, which it had been compelled to pay. Upon these facts the court held that the condition subsequent had been broken, that the property reverted to the complainants, and the state ceased to have any legal interest in it; that the possession of the defendants was no longer the possession of the state; that the court could not enforce a specific performance of the covenant of indemnity, because this could only be done in a proceeding directly against the state, which could not be sued in its own courts; that the defendants hold the property as trustees of the complainants and for their benefit, and that the proceeds in their hands, or so much of it as may be necessary, be converted into money and be applied toward the payment of the damages suffered by the complainants as prayed in their bill, upon a waiver by the complainants of the forfeiture growing out of the breach of the condition.

PRESIDENT ETC. OF BANK OF MICHIGAN v. NILES.

[1 DOUGLASS, 401.]

CLAUSE IN A CHARTER OF A CORPORATION PROVIDING "THAT THE LANDS, TENEMENTS, AND HEREDITAMENTS, which it shall be lawful for the said corporation to hold, shall be only such as shall be required for its accommodation in relation to the convenient transacting of its business, or such as shall have been *bona fide* mortgaged to it by way of security, or con-

veyed to it in satisfaction of debts, previously contracted in the course of its dealings, or purchased at sales upon judgments, which shall have been obtained for such debts," prohibits it from buying or selling or becoming a speculator in lands.

CORPORATION PROHIBITED BY ITS CHARTER FROM DEALING IN REAL ESTATE, entering into contracts for the purchase and sale of such property contrary to its charter, can not come into a court of equity and compel their specific performance. Equity will leave the parties as it finds them.

BILL in chancery, brought by the bank, to compel the defendant to a specific performance of a contract entered into by him with the bank. By the contract, the complainants bound themselves to obtain a good and sufficient deed of certain mill property, and convey to the defendant three undivided fourth parts of it within sixty days thereafter. The defendant agreed to execute a mortgage for the purchase money, twenty-eight thousand dollars, upon the property conveyed to him, and upon the remaining interest already possessed by him in it as tenant in common. The complainants performed their part of the contract, and seek to compel a performance by defendant. The chancellor sustained a demurrer to the bill. Complainants appeal.

J. F. Joy, for the complainants.

A. D. Fraser, for the defendant.

By Court, **FELCH, J.** It is claimed on the part of the defendant, that the contract set forth in the bill was such as it was not competent for the complainants, under their charter, to make; that the buying and selling of real estate, except in the cases specified in their charter, is not within the scope of their corporate powers, and is unlawful; and that, the performance of this contract involving a violation of law, courts of equity would not interfere, or lend their aid to either party, to enforce it. Other questions of minor importance are presented, but we shall examine only that which pertains to the merits of the case as made by the bill. The third section of the charter of the complainants (Laws 1827, 505), provides, that they "shall be in law capable of purchasing, holding, and conveying estate, real or personal, for the use of the said corporation." The ninth section provides, "That the lands, tenements, and hereditaments, which it shall be lawful for the said corporation to hold, shall be only such as shall be required for its accommodation in relation to the convenient transacting of its business, or such as shall have been *bona fide* mortgaged to it by way of security, or conveyed to it in satisfaction of debts, previously contracted in the course

of its dealings, or purchased at sales upon judgments, which shall have been obtained for such debts." Under these, and the other provisions of the charter, what are the rights and powers of the corporation as to becoming purchasers and vendors of real estate?

A capacity to purchase and alien land, unless specially restrained by its charter or by statute, has been held to be an incident, at common law, to every corporation. This general power it has been found necessary, in England, to restrain by statute; and there their powers in this respect are understood to be general and unlimited, except so far as controlled by such statutes. A large proportion of the corporations there hold their corporate rights by prescription. This supposes the original grant nowhere to be found in written form. The uncertainty of the limits of the powers granted, and the great extent of powers claimed at an early period, created a necessity of limiting them by act of parliament. The statutes of mortmain have this effect, in reference to purchasing and holding lands. In this country few instances can be found of the existence of corporations, whose charters did not originate in express legislative enactment, and are not to be found printed in the statute books. In these cases the grant of power is before us. The charter defines the grant, with its restrictions and limitations. Unless some other statute, enacted by the same authority, either general or special, can be found, enlarging or restricting those powers, we look no further for the rights of the body corporate.

A corporation, says Chief Justice Marshall, being the mere creature of law, possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence: *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518. The same doctrine is asserted by McLean, J., in *Beatty v. Knowler's Lessee*, 4 Pet. 152, and is, in effect, contained in all the American cases on the subject. The act of incorporation, whatever may be its object, usually contains, in this country, a specific grant of a right to take and hold lands, but restricts it to certain defined objects, to a specific amount in value, or to such as are acquired in a particular mode. The better opinion seems to be that here, where charters almost uniformly contain such power and such limitation, corporations can not take and hold real estate for purposes foreign to their institution: 2 Kent's Com. 283; *First Parish in Sutton v. Cole*, 3 Pick. 232; Ang. & Ames on Corp. 80. In determining on the extent of such power in a particular instance,

under a charter, we are to look at the grant and the restriction; and, unless the power is found in the charter, it can not be considered as possessed. The very grant of specified powers, under restrictions, is an exclusion of other powers in reference to the same subject-matter, not granted by the charter: *People v. Utica Insurance Co.*, 15 Johns. 857 [8 Am. Dec. 243]. The lawful right of the Bank of Michigan, to become the grantee of lands, must, then, be such, and such only, as is given by the provisions of its charter. The ninth section clearly forbids the holding of any lands not specified by its terms.

It is urged by the counsel for the complainant, that the general power to purchase and convey real estate, given by the third section, is not affected or limited by the provisions of the ninth section. The latter only uses the word hold; and it is contended that the right of buying and selling lands is not unlawful; that the only design of the provision was to prevent real estate from being locked up in mortmain in the hands of the corporation. But it seems to me that a further object is evident in the charter. The general object of the charter is to create a money corporation, to give all the power required for banking operations, and no more. The corporation is expressly authorized to hold real property requisite for carrying on the banking business, and such as it may be necessary to receive in satisfaction of debts due it. But it is clear that it never was designed to make this corporation a real estate broker, or to permit it to divert its funds from their legitimate channels, to become a speculator in lands. This design seems to me to be evident, not only from the tenor of all the provisions of the charter, but also from the limitations before mentioned. In *Angell & Ames on Corporations*, 80, the design of this kind of restriction is said to be to prevent monopolies, and to confine these powerful bodies strictly within their proper sphere. In *Silver Lake Bank v. North*, 4 Johns. Ch. 370, the chancellor speaks of the restraining clause in the charter as "only meant to prohibit the banking company from vesting their capital in real property, and in engaging in land speculations." See also *Trenton Bank v. Woodruff*, 1 Green's Ch. (N. J.) 117. It is clearly the intention of the law-makers thus to limit the operations of the bank; and that construction must be given to the act, unless a different meaning is conveyed by the words of restriction.

To sustain their view of the subject, on the part of the complainants, the case of *Leasure v. Hillegas*, 7 Serg. & R. 313, is cited. This was an action brought by Hillegas to recover pos-

session of certain premises occupied by Leazure. The title exhibited by the plaintiff showed a conveyance to the Bank of North America, and from the bank to the plaintiff's grantor. It was claimed that the bank had no power to take and convey the land, and, therefore, that no title could be derived through it by the plaintiff. The restraining clause in the charter of that bank provides, that the lands it shall be enabled to "purchase and hold," shall be only such as are therein specified. The court held that, under this provision of the statute, it was prohibited only from holding a title—from retaining lands purchased, and not from purchasing. This decision was made directly with a view to the statute of mortmain, which was in force in Pennsylvania, and with reference to which the words might, perhaps, well have been considered as used by the law-makers. The effect of allowing corporations to take lands, under that statute, was, that the state would have the right immediately to take possession of, and to retain them. They became the property of the state whenever they were claimed by it.

The state, instead of having an object in restraining the banks from receiving conveyances, or dealing in lands, really had an object in permitting and promoting it. Every purchase was, at the option of the state, for its benefit, and, though the bank could convey it to another, yet the grantee took the property subject to the same right of the state to deprive him of it. The charter being granted with reference to the general statute of mortmain, then in force, and constantly attaching its consequences to all lands, the title to which passed through the corporation, it was not perhaps unreasonable to construe it, as not intended to prevent the buying of lands, subject to the right of the state, but only to holding or retaining them against the state. And the court, in the case last cited, say, that while the purchasing and *holding* might be dangerous, by bringing too much land into mortmain, yet purchasing subject to the statute of mortmain, which authorized the commonwealth to appropriate the land to its own use, could be attended with no danger. And, indeed, when this statute was in force, it could not be necessary to incorporate a clause in the charter restraining the corporation from buying property, although it might be to put a restriction on the amount they could retain as against the state. Without such restriction, there was no danger of their becoming dealers in land, and diverting their capital to this, instead of the legitimate business of banking. The forfeiture incurred under the statute of mortmain would prevent it, and the defect in a title

passing from the corporation would deter purchasers. In the opinion of the chief justice just cited, the right of a corporation to purchase lands, though its charter is silent on the subject, is assumed. See also *Baird v. Bank of Washington*, 11 Serg. & R. 411.

The statute of mortmain has never been in force in this or any other state of the union, except Pennsylvania. We can not consider the restrictions or powers specified in the charter of the Bank of Michigan, as made in reference to such previous law binding on the acts of the bank. Nor can we say that the mischiefs which it might otherwise be construed to include, are already provided against by another law. On the contrary, it stands alone, and is to receive a construction warranted by its language, and in accordance with the evident intention of the law-makers, as disclosed by the act. The disability to hold lands seems almost necessarily to imply a disability to become the grantee and vendor of real estate. There can be no grant of land without a grantee capable of taking; and he who takes and conveys to another must necessarily be, for the time intervening, the holder of the estate. If the restriction in the charter takes away the capacity to hold, it must, therefore, take away the power of receiving the estate for the purpose of conveying to another. The corporation can not deal in real estate, receiving and conveying the title in its corporate capacity, without in every instance holding that estate; and a title derived through it, to be good, must necessarily imply the right of the corporation to take the estate and hold the title until conveyed.

When the statute restricts the corporation in the right of holding lands, it seems to me to intend to make all holding of real estate for purposes not expressly excepted by the charter, unlawful. And this right is not measured by the length of time which the holding continues. If it is intended only to make the continued holding unlawful, when does such holding by the bank cease to be lawful? If it is lawful to take a title and hold for an hour, does it become unlawful if a conveyance should not be made for a day or a week? Does the lawfulness or illegality of the transaction depend on the length of time the title is held? If so, the tendency of the restriction would be to induce speedy conveyance by the corporation, but not to prevent its entering the field as a land speculator. It might relinquish its banking business altogether, and, investing all its means in, and directing all its attention to, the buying and selling of real estate, would keep within its charter, so long

as titles passed rapidly on the record to and from the corporation.

It is said this provision was intended to have the same effect as the statute of mortmain, in preventing lands from accumulating and being bound up in the hands of corporations. To me it seems no such exclusive design could be had, because little necessity for accomplishing that object existed. This statute, like many of the ancient statutes of England, had its origin in a state of things which never did and never can exist in this country. The ecclesiastical corporations of that country, who held their corporate powers under no written grant, with no very well defined limits of power, and without specification of the time when their corporate existence should cease, absorbed in perpetuity many of the best lands in the kingdom, prevented their transmission from man to man, withdrew them from the feudal services which were ordained for the common defense, and curtailed the lords of the fruits of their seigniories, their escheats, wardships, reliefs, and the like. This state of things made it necessary to provide that titles obtained by such corporations should not thus be absorbed forever, and to release the lands from what was quaintly denominated the death-clutch of the corporation. Scarcely a single reason exists here for the imposition of similar restrictions on the tenures of corporations. The holding of land by a corporation here deprives no lord of his accustomed services, or his rents, or his escheats, or his reliefs, attached to, or growing out of the land. It withdraws no feudal services from a superior, or from the government. Premises so held are liable to contribution for public expenses as if held by individuals. They may be sold and conveyed voluntarily by the corporation, or taken by force of law for its debts, and the title of the institution defeated. Besides, we have few charters *in perpetuum*, and none whose powers are not clearly defined. The period of their existence is usually fixed by the very act that gives them life. The charter under which the complainants have existence limits that existence to a period less than the average length of life of individuals. At the end of that time, unless legislative aid further extend its powers, all the lands held by the corporation cease to be so held. When there is no especial legislative act to the contrary, upon the dissolution of its charter, all the lands held by a corporation revert to the grantor. By the provisions of the present laws of this state, they become liable to be sold for the payment of its debts, and the proceeds to be distributed among the stock-

holders; and if such sale should fail to be made, they would revert to the grantor.

From this view of the subject, it seems scarcely a reasonable construction of the limitation referred to, in the charter of the bank, to suppose that it was intended only to restrain the continued holding of lands for an indefinite period in the hands of the bank. Both the phraseology, and the evident intent of the restriction, appear to me to apply to that holding of land which is necessary in all cases of a conveyance to and from the bank. It is intended to restrain the corporation from entering into speculations and purchases of real estate, which are clearly foreign to the objects of its creation. The immunities incident to a corporation are thrown around its capital, its profits, and its business; but they are not intended to be extended to it as a buyer and seller of lands. Those which it may hold are specified—the necessary building for banking purposes, and such lands as it may be found necessary to receive for debts due to it. All others are without the scope of its legitimate powers and business.

It is not pretended that the lands mentioned in the complainants' bill are within this exception. The bill shows that the complainants were to purchase them of a third person, and to sell them to the defendant. It contemplated not even a payment in full by the bank, but, on the contrary, contains a contract that the complainants shall, within five years, clear the premises from any mortgage or incumbrance they may create upon it for the purchase money. It is difficult, from the facts set out in the bill, to look upon the transaction contemplated by the contract to be other than a speculation in lands, entirely foreign to the objects and beyond the legal powers of the corporation. If such a transaction be construed as within the scope of its chartered rights, it is certain there can be no limit fixed to the business of a bank. While I can not doubt that the transaction contemplated by the contract was an unlawful one on the part of the bank, I do not deem it necessary to determine what would have been the effect on the title to the property, if such a conveyance had been made to the bank, and by it to another person. Many charters apply the restriction to the property which the bank shall be enabled to hold; this speaks of that which it shall be lawful for it to hold. Even under the former words, it seems to have been considered, in Pennsylvania and Virginia, that the title would not be defeated. A violation, and consequent forfeiture of its charter, would be a cer-

tain consequence of such unlawful act. But our inquiry here is not what would be the consequences of the act, but whether the act was lawful; and I am satisfied that the contract could never have been carried into effect by the bank, without holding real estate not allowed by its charter, and in violation of its provisions.

This leads to the second inquiry in the case—can this suit be maintained? It was one of the earliest principles established, that courts of justice will not lend their aid in enforcing contracts which are contrary to law. If, in transactions of this character, either party has obtained the advantage of the other, however great may be the hardship of the case, courts will not aid one violator of law against the other, but will leave them as they are found. *Melior est conditio possidentis* is the maxim in such case, both in law and equity. The rule applies as well when the subject-matter of the contract is *malum prohibitum*, as when it is *malum in se*. In *Aubert v. Mase*, 2 Bos. & Pul. 371, the doctrine which applies in cases of *malum in se*, was applied to a transaction prohibited by statute. In *Watts v. Brooks*, 3 Ves. jun. 612, the same doctrine was applied in equity. In *Ribbons v. Orickett*, 1 Bos. & Pul. 264, under the statute prohibiting the furnishing of provisions to voters, the court refused to enforce a contract by the defendant to pay for such provisions, upon the ground that it was a contract to disobey the law. The same principle runs through all the English cases.

The courts of this country have uniformly adopted the same principle, and refused to assist either party in the enforcement of a contract to violate the law: *Mitchell v. Smith*, 1 Binn. 110 [2 Am. Dec. 417]; *S. C.*, 4 Dall. 269; *Maybin v. Coulon*, Id. 298; *Duncanson v. McClure*, Id. 308; *Nichols v. Ruggles*, 3 Day, 145 [3 Am. Dec. 262]; *Pratt v. Adams*, 7 Paige, 615; *Armstrong v. Tbler*, 11 Wheat. 258; *Hannay v. Eve*, 8 Cranch, 242; *Patton v. Nicholson*, 3 Wheat. 204; *Ex'rs of Cambioso v. Assignees of Maffet*, 2 Wash. C. C. 98; *Bartle v. Coleman*, 4 Pet. 184; *Craig v. State of Missouri*, Id. 410. In *Hunt v. Knickerbacker*, 5 Johns. 327, the rule is laid down correctly, to be, that all contracts, which have for their object anything which is repugnant to the general policy of the common law, or contrary to the provisions of any statute, are void, and not to be enforced. This was a contract to sell lottery tickets without authority from the legislature of New York, which was rendered illegal by a law of that state; and the court refused to enforce the contract. "No case, I believe, can be found," says Thompson, J., "where an action

has been sustained, which goes in affirmance of an illegal contract:" *Burt v. Place*, 6 Cow. 431. The inquiry as to the character of the act to be done, is, whether it is rendered illegal. It is, I apprehend, of no importance to determine what is the consequence of the violation of the law to the parties—whether it is visited with punishment as a criminal act, or is attended with civil consequences affecting the pecuniary interests of the parties, or whether they are left to the mercy of each other. When once it is determined that the act contracted to be done is prohibited by law, the court will afford no aid.

There may be a difficulty in cases where contracts are made in reference to matters but remotely tainted with immorality or illegality, and not the immediate subject of the undertaking of parties, to determine in what instances the principle should be applied; but when the very act contracted to be done is itself illegal, there can be no doubt of the application of the principle.

The Bank of Michigan contracted to obtain and convey a title to real estate, under circumstances which made it a transaction prohibited by the spirit and terms of its charter. The defendant, with knowledge of the unlawfulness of the transaction (for the charter is declared to be a public act), entered into the contract. Each party to the contract put himself in the power of the other; and, as a court of equity would not interfere to compel the bank to perform its agreement, by buying and selling lands in violation of the law, so aid can not be afforded to the bank to compel the defendant to perform on his part. The decree of the chancellor sustaining the demurrer, must be affirmed.

Decree affirmed.

BOSTWICK v. DODGE.

[1 DOUGLASS, 413.]

HOLDER OF A NOTE OR BILL, TRANSFERRED TO HIM BEFORE MATURITY, IN PAYMENT OF AN ANTECEDENT DEBT, shall be deemed to have received it for value, in the usual course of trade, and is entitled to recover its amount of the maker or acceptor, notwithstanding any defense which existed against the original payee.

ASSUMPT upon a promissory note made by Bostwick, payable to one Hooper and indorsed by him before maturity, and delivered to Dodge in payment of a debt due him by Hooper. Bostwick offered to prove on the trial that the note was given

for bills upon a bank, which was never legally organized, and whose bills were worthless when received by him for the note. Upon objection to this evidence the court rejected it, and defendant below now brings this writ of error.

N. B. Ramsdell, for the plaintiff in error.

P. R. Adams, for the defendant in error.

By Court, Ransom, C. J. The single question presented by this case is, whether the holder of a note or bill, transferred to him before maturity, in payment of an antecedent debt, shall be deemed to have received it for value, in the usual course of trade, and entitled to recover its amount of the maker, or acceptor; or, whether he merely succeeds to the rights of the indorser, and holds the paper subject to all the equities which may have existed between the original parties. That the holder of negotiable paper, who acquires it without consideration, or for consideration, if overdue, or who has notice when he receives it, that it could not be enforced between the original parties, takes it subject to any defense that could be set up in an action between those parties, is a doctrine familiar to all. Equally well settled and understood is the principle, that any want or failure of consideration, whether partial or total, or any fraud even, between antecedent parties, will constitute no defense to a note or bill in the hands of one who obtained it in good faith, for a valuable consideration, at or before its maturity, and without notice of any circumstances impairing its validity. These principles are said by Justice Story, in *Swift v. Tyson*, 16 Pet. 15, to have been so long and so well established, and to be so essential to the security of negotiable paper, that they are laid up among the fundamentals of the law, and require no authority or reasoning to be brought to their support.

In the case before us, there is no pretense that the defendant is not a holder in good faith without notice, and for a valid consideration as between himself and the indorser; but it is insisted that the transfer of the note in payment of a pre-existing debt, is not in the usual course of trade, and for a valuable consideration, as understood in the mercantile law; and therefore does not preclude the plaintiff from showing that the note was void in its inception for want of consideration. It is contended that the valuable consideration contemplated by the commercial law in reference to this question, is a present one—the payment of money, or delivery of goods, or other thing of value, at the time, and upon the credit of the transfer of the paper. We do

not feel called upon to discuss this question, either upon principle, or by a review and criticism of the adjudged cases in which it is decided. In England, and in most of the states of the Union, it has been long and uniformly held, that the extinguishment of a pre-existing debt, was as valid and sufficient a consideration for the transfer of a negotiable instrument, as the payment of money, or the delivery of any species of property whatever. That the rule is one of great convenience, and necessity even, to a commercial community, is too obvious to require illustration, and its adoption in no way contravenes the principles of natural justice.

A different rule seems to have obtained in New York, as established in the cases of *Bristol v. Sprague*, 8 Wend. 425, and *Ross v. Brotherson*, 10 Id. 85. The more recent decisions, however, of the courts of that state, recognize the doctrine of the English cases. To this effect are the *Bank of Salina v. Babcock*, 21 Id. 500; *Bank of Sandusky v. Scoville*, 24 Id. 115; and *Williams v. Smith*, 2 Hill, 301.

In support of the view we have taken of this question, the following cases are referred to, and are believed to be perfectly conclusive: *Twinsley v. Sumrall*, 2 Pet. 170; *Swift v. Tyson*, 16 Id. 2. The latter case is directly in point, and the opinion of the court, delivered by Judge Story, is an elaborate one, reviewing the authorities, both English and American. See also *Brush v. Scribner*, 11 Conn. 388 [29 Am. Dec. 303]; Story on Bills, sec. 192; 3 Kent's Com. 81. Among the English cases to the same effect, are *Bosanquet v. Dudman*, 1 Stark. 1; *Heywood v. Watson*, 4 Bing. 496; *Pillans v. Van Mierop*, 3 Burr. 1664; *Ex parte Bloxham*, 8 Ves. 531. See also Bayl. on Bills, 527; Ohit. on Bills, 85.

We are of opinion that the evidence offered by the defendant was properly rejected. There is, therefore, no error in the record, and the judgment of the court below must be affirmed, with damages and costs.

Judgment affirmed.

NEGOTIABLE INSTRUMENT RECEIVED IN PAYMENT OF A PRE-EXISTING DEBT IS A PAYMENT OF IT: *Homes v. Smyth*, 33 Am. Dec. 650; also *Bay v. Coddington*, 9 Id. 272, note, where the subject is discussed at length. See *Brush v. Scribner*, 29 Id. 303.

CASES
IN THE
HIGH COURT OF ERRORS AND APPEALS
OF
MISSISSIPPI.

BREWER v. HARRIS ET AL.

[2 BREWERS AND MARSHALL, 84.]

COURTS OF LAW HAVE CONCURRENT JURISDICTION WITH COURTS OF EQUITY upon questions of fraud.

PARTIAL OR TOTAL FAILURE OF CONSIDERATION in a promissory note may, in an action at law, be legitimately introduced in evidence.

UNDER THE PLUA OF NON ASSUMPSIT, EVIDENCE OF FRAUD, or total failure, or want of consideration, may be given, because it reaches to the cause of action and the validity of the contract.

ASSUMPSIT upon a promissory note. The facts appear in the opinion.

Hays, for the appellants.

Brooke and Thompson, for the appellees.

By Court, THACHER, J. The appellant purchased a lot of land from the trustees of the town of Emery, in Holmes county, and gave his promissory note as security for the purchase money. On the trial, he tendered a witness to prove certain false representations made by the trustees at the time of the sale of the lot mentioned, which trustees are the payees of the note sued upon, and also to show that the lot of land had become of no value in consequence of the neglect of the trustees to make their promised improvements in the town of Emery, which were the inducements to the purchase. The testimony offered was designed by the defendant below to impeach the legality of the whole contract on the score of fraud, and to show a total failure of the consideration of the note. It has been repeatedly decided that

courts of law have concurrent jurisdiction with courts of equity upon questions of fraud. Fraud saps the foundation of every contract in which it exists, and, where it evinces that a plaintiff is not entitled to recover anything because of its existence, is properly cognizable by a court of law. It has also frequently been decided, that a failure of consideration, as well partial as total, may be introduced legitimately in evidence in an action at law upon a promissory note, because such defense may diminish the multiplicity and circuitry of actions, which it is the policy of the law to discourage. These points have been so often settled that they demand no reference to authorities in their support.

The testimony rejected in the court below, as appears by the bill of exceptions, was to the effect that the lot of land, the consideration of the note, was of "no value," and was so in consequence of the neglect of the payees of the note to perform certain things that constituted a part of the original contract of the sale of the land. If the testimony had been introduced, it might have had a tendency in the minds of a jury to have produced a result different from what appears by the record. The evidence was of a kind competent and admissible upon a trial of this description, and appropriate for the consideration of the jury. The defendant could reap no benefit in an action upon the covenants in the conveyance, if it contained any, because they go only to the title and not to the value of the land. It was fairly a question for the jury to say, whether the note, in the case under our consideration, was procured upon the false representation of the payees, in which case it was utterly void, and the evidence was therefore a complete bar to the action; and it was also its province to inquire and find whether the consideration had totally and utterly failed, in which event the evidence would show that there never was any cause of action. The rejected testimony might have formed a link in a chain of evidence completely substantiating one or the other or both of these positions. Whatever was its force, the defendant had a right that a jury should weigh and decide upon it.

It is necessary, further, to examine this proposed evidence with reference to the state of pleadings in the action. The plea of *non assumpsit* was alone pleaded to the declaration. Under this plea, I conceive the defense might properly be tendered. Fraud in the contract, or a total failure, or want of consideration, answers an action upon a note, and such defense is legitimate under the general issue, because it reaches to the cause of action, and the validity of the contract: *Frisbee v. Hoffnagle*, 11

Johns. 50; *Sill v. Rood*, 15 Id. 230. But a defense that fell short of either of these, I am led to believe, in a case like the one before us, would require and compel some special notice and advertisement to the opposite party of its nature and extent. Many authorities hold that a partial failure of consideration of a note is inadmissible under the general issue: *Doty v. Bates*, 11 Id. 547; *Sill v. Rood*, 15 Id. 230; *Winter v. Livingston*, 13 Id. 56. Chitty lays down the rule (1 Chit. Pl. 47), which the authorities seem to support, that under the general issue of *non assumpsit*, any matter may be introduced in evidence, which manifests that the plaintiff never had any cause of action, and, in general, most matters in discharge of the whole action. A plaintiff is supposed to be always ready to meet the objection that he has no subsisting cause of action, but to defenses in mitigation and diminution of his damages and demand, he may well be uninformed and taken by surprise. It is a commonly received as well as just rule of pleading which requires that the plaintiff should be apprised of the facts upon which his defendant relies, so that he may be prepared to shape his answer, and encounter the opposition: 1 Chit. Pl. 215. These remarks apply to cases where the plaintiff seeks to recover a sum agreed upon, and not necessarily where he proceeds upon a *quantum meruit*, or generally, for unliquidated damages.

The judgment of the court below must be reversed, and a new trial awarded.

CONCURRENT JURISDICTION OF COURTS OF LAW AND EQUITY IN CASES OF FRAUD: See cases in this series, collected in note to *Jamison v. Beaubien*, 36 Am. Dec. 535.

FRAUD IN OBTAINING A PROMISSORY NOTE may be set up as a defense to an action thereon by the payee: *Shepard v. Hawley*, 6 Am. Dec. 244; *Kirkland v. Lott*, 33 Id. 435; *Barringer v. Nesbit*, 1 Smed. & M. 22. The principal case is cited in *Anderson v. Hill*, 12 Id. 683, and *Ferguson v. Oliver*, 8 Id. 337, to the effect that in an action on a promissory note, under the general issue, fraud that goes to a total failure of consideration may be proved. It is also cited in *Raspberry v. Moye*, 23 Miss. 321, to the effect that a partial failure of consideration to a promissory note may be shown as a defense, if introduced under a special plea.

COHEA v. HUNT ET AL.

[2 SNEDES AND MARSHALL, 237.]

WHEN NOTE IS PAYABLE AT A BANK, DEMAND, as a general rule, must be made within banking hours.

IF AFTER BANKING HOURS A NOTE BE PRESENTED FOR PAYMENT at a bank, at which it is payable, on the day it falls due, and the officers of

such bank are in attendance, and give answer that no funds have been or are on deposit to pay it, it is a sufficient demand to charge the indorsers. WHERE TESTIMONY MAY ADMIT OF DIFFERENT AND DISTINCT CONSTRUCTIONS, it is the province of the jury to adopt that construction which is most satisfactory to their minds.

THE facts sufficiently appear in the opinion.

D. Shelton, for the plaintiff in error.

W. Yerger, for the defendants in error.

By Court, CLAYTON, J. This was an action of *assumpsit* against the makers and indorsers of a promissory note. The defense offered was, that there was no proper demand to charge the indorser Hunt. The note was payable at the branch of the Planters' Bank, in Jackson. The evidence, as to the demand, was that the notary went to the bank upon the proper day, and immediately after the close of banking hours, presented the note and demanded payment of the cashier, who replied "that the note would not be paid, and that no funds were deposited in the bank for that purpose." The court, at the request of the counsel of Hunt, charged the jury, "if they believed the bank had regular hours of doing business, and that notes payable there were by the custom of the bank, considered dishonored, unless paid within such hours, it is not sufficient evidence of presentment and demand to charge the indorser in this case, if the note were not presented and demanded, until after the close of the banking hours."

The rule upon this point was recently considered by this court in the case of the *Commercial and Railroad Bank of Vicksburg v. Hamer et al.*, Opinion Book, B. 278. It is there stated to be, "that if a note be presented for payment at a bank at which it is payable, on the day it falls due, but after banking hours, still if the officers of the bank be in attendance, and give answer that there are no funds on deposit, and have been none during the day to pay the note, it is a sufficient demand." Such circumstances constitute an exception to the general rule, that the demand must be made during banking hours. That decision we believe to be correct. Nor are these the only circumstances which would have that effect, if the notary received the same answer, and secured the same benefit to the holder, which he would have done, if the demand had been made at an earlier hour. In this case the court should have explained to the jury that there were exceptions to the general rule, should have stated the nature of the exceptions, so far as the evidence

in the case pointed to any, and then have left them to apply the testimony to the law.

It is attempted, in argument, to distinguish this case from the one above cited, in this, that the answer of the cashier in this case does not as in that, negative the idea, that funds had been on deposit during the day, and before the close of banking hours, to pay the note. Here the answer was, "that the note would not be paid, and that no funds were deposited in the bank for the purpose." This language, "that no funds were deposited," may refer not alone to the precise moment when the demand was made, but to the whole preceding part of the day, and it may as well express the one idea as the other. Where the testimony may admit of different and distinct constructions, it must be the province of the jury to adopt either construction which is most satisfactory to their minds. To determine otherwise, would transfer to the court the power to decide upon the weight of evidence, and the effect of testimony. As a general rule the demand must be made within banking hours, but there are certain well-settled exceptions. The plaintiff was endeavoring, by his proof, to bring himself within one of the exceptions, and a part of the evidence introduced was with a view to that end. The charge goes too far. The result might have been different, if the jury had been informed of the exception to the rule, instead of having that rule laid down as a general and inflexible proposition.

The charge of the court is, in its terms, founded upon the custom of the bank. It has express reference to the custom of considering notes as dishonored, which were not paid within the business hours. This custom was proven by a witness introduced by the defendant, and he stated that he did not know that any formal demand was generally made. If this was the custom of the bank, the defendant in error is bound by it, just as the plaintiff is by the custom as to the business hours: *Boston Bank v. Hodges*, 9 Pick. 420. This should likewise have been explained to the jury, if the note were in the bank on the day it fell due. We think that justice and law require a new trial to be granted, and we therefore reverse the judgment and direct it to be done.

NOTE PAYABLE AT A BANK must be presented at the bank for payment to render the indorser liable: *Sullivan v. Mitchell*, 6 Am. Dec. 546; and the fact that the maker waives notice does not dispense with such demand to charge the indorser: *Smith v. McLean*, 7 Id. 693. The case of the *Commercial and Railroad Bank v. Hamer*, cited in the opinion, is reported in 40 Id. 80.

NATCHEZ INSURANCE COMPANY v. STANTON ET AL

[2 SMITHS AND MARSHALL, 340.]

UPON FAILURE OF NEGOTIATIONS FOR AN AMICABLE ADJUSTMENT OF LOSSES between insurer and assured each is remitted to his original legal rights. **POLICIES OF INSURANCE CREATE RECIPROCAL RIGHTS AND OBLIGATIONS** which require the utmost good faith in both parties.

CERTAIN WARRANTIES ARE IMPLIED ON THE PART OF THE ASSURED, and are as binding as though expressed; such as seaworthiness, not to deviate, and that the goods shall be properly stowed.

ANY VOLUNTARY DEVIATION IS A CHANGE OF THE RISK; it forms a departure from the contract, and an attempt to substitute another. It is not necessary that the risk should thereby be increased; it is sufficient that it be changed.

EFFECT OF A DEVIATION IS TO DISCHARGE THE UNDERWRITERS. The owner of the ship, by his breach of the implied warranty against deviation, becomes liable to the owner of the goods for their loss.

TAKING A BRIG IN TOW BY A STEAMER IS A DEVIATION BY THE LATTER, there being nothing in the policy which expressly authorized it.

MASTER AND MARINERS OF A VESSEL ARE THE AGENTS AND SERVANTS OF THE OWNERS of the cargo as well as of the owners of the vessel, hence a deviation by them discharges an insurance on the cargo.

UNDERWRITERS ARE LIABLE FOR A LOSS THE PROXIMATE CAUSE OF WHICH is one of the enumerated risks, though the remote cause may be traced to the master and mariners; but a voluntary deviation by the master is not such a remote cause as to bring it within the rule.

INSURER IS LIABLE FOR EXTRAORDINARY PERILS ONLY, unless by express stipulation, and not for such as proceed from the negligence, unskillfulness, or misconduct of the master and crew.

ADVERTISEMENT THAT COMPANY WOULD INSURE GOODS on certain enumerated boats amounts only to a waiver of the implied warranty of seaworthiness.

USAGE OF TOWING BOATS BY STEAMERS ON THE MISSISSIPPI could not affect a contract of insurance made at Natchez, unless shown to be so general and well known that it was fair to presume the parties contracted with reference to it.

COVENANT upon a policy of insurance. Judgment for the plaintiffs. Defendants prosecute this writ of error. The other facts sufficiently appear in the opinion.

Winchester, Montgomery, and Boyd, for the plaintiffs in error.

Quitman and McMurran, contra.

By Court, CLAYTON, J. This was an action upon a policy of insurance, instituted to recover damages for a loss sustained on three hundred and forty-one bales of cotton, shipped upon the steamboat Fort Adams. The policy was in the usual form, and extended to all kinds of goods and merchandise, laden or to be laden on board any good steamboats, the adventure to begin

immediately upon the loading thereof, and to continue until such goods and merchandise shall be safely landed at New Orleans; the insurance to extend from Grand Gulf, in Mississippi, to New Orleans, with privilege to touch at any port or place usual on said voyage. The insurers agreed to bear the adventures and perils of the river, of fire, and all other perils, losses, and misfortunes that had, or should come to the hurt, detriment, or damage of said goods and merchandise, or any part thereof. And in case of any loss, or misfortune, it should be lawful to and for the assured, their factors, servants, and assigns, to labor for the defense, safeguard, and recovery of the goods, and the assured engaged to do so, at the expense of the insurers, without prejudice to the insurance.

The steamer *Fort Adams*, in the month of December, 1836, being partly loaded with cotton, left the mouth of Cole's Creek, proceeded to Natchez, there took in tow the brig *Auguste*, went on to Fort Adams, and remained there about twenty-four hours, during which, more cotton was received both on the brig and the boat. She then proceeded on her way to New Orleans, but met with a heavy storm, which compelled her to lie by one night. The next morning, the storm having somewhat abated, she again got under way; but the storm increased in violence, the brig and boat both pitched and labored excessively, when it was discovered that the boat was leaking, and the hold rapidly filling with water. In this emergency they prepared to make for the shore, directing the crew of the brig to prepare to cast off. This, however, to use the language of the protest, "was not done until they came very near the shore, when the brig unlashd and came to anchor, and the boat shooting ahead took the ground," and afterwards sunk.

A correspondence took place between the insured and the insurers, relative to the adjustment of the loss, but failing to come to any agreement, this suit was brought. The cause has already been twice to this court, and was each time reversed and remanded. On the first occasion, the rule by which the damages should be estimated constituted the point of inquiry; on the second, the criterion by which the damage under that rule was to be ascertained, was the question to be determined: *Natchez Ins. Co. v. Buckner*, 4 How. 63; *Stanton v. Natchez Ins. Co.*, 5 Id. 744. Upon neither of these occasions were the points discussed, which are now submitted for consideration. Then it seems to have been taken for granted, that the defendants were to some extent liable; now, however, it is insisted that they are

not at all responsible. Questions of insurance are with us of rare occurrence, and the principles which govern them are not familiar to those whose minds are given to other branches of the law. Hence it is probable, that the views of counsel have become more extended, as they have proceeded in the investigation, and they have ascertained the application of principles, which in the beginning they did not perceive. And hence the case assumes, in their view, an entirely new aspect.

It is insisted by the counsel of the defendants in error, that this view of the case is excluded, by the correspondence between the parties, before the commencement of the suit, that the plaintiffs in error then admitted their liability, and they should be holden bound by that admission. The correspondence contains various offers of adjustment, propositions were submitted by the one to the other, but no one which met the concurrence of both parties. In the letter of the twenty-eighth of March, 1837, from the plaintiffs in error, it is stated "that the company are to indemnify Stanton, Buckner & Co. all damages sustained by a peril of the river," when proof of a specified description is afforded. In the whole correspondence the idea is held out, that they are willing to settle upon certain terms, and certain principles, which were rejected by the defendants in error. Upon the failure of the negotiations for an amicable adjustment, the parties, in our opinion, were remitted to their original legal rights, and we are bound to make our decision upon that basis.

The defense now set up is that the taking the brig in tow, was a deviation from the terms of the contract of insurance, which so varied and increased the hazard as to discharge the underwriters. Policies of insurance create reciprocal rights and obligations, they form a class of contracts in which the utmost good faith, *uberrima fides*, is requisite on both sides. Each party is bound to fulfill the warranties, either expressly entered into, or implied by the law. On the part of the assured, certain warranties are implied, which enter into and form part of the contract, and by which he is as much bound as if they were expressed. Of these are seaworthiness, proper documentation, not to deviate, and that the goods shall be properly stowed: 1 Kinne, 505, 536; Sherman's Dig. of Mar. Ins. 193; 1 Ph. Ins. 306; Id. 21.

The warranty as to proper documentation does not extend to the owner of goods, but this seems to be the only exception in his favor: 1 Kinne, 508. On the subject of seaworthiness, some remarks may be made in a subsequent part of this opinion; at

present we are dealing only with the question of deviation. Phillips, in the passage just referred to, says, "the doctrine of deviation is founded on an implied understanding and agreement between the parties, arising on the fact of making the assurance, that the adventure is to be pursued in the usual manner, or that the risk shall be such as vessels are usually subject to, and not voluntarily varied by the assured or those who represent him." And the doctrine applies as well to the navigation of rivers, as of the ocean: 1 Ph. 571; *Gazzam v. Ohio Ins. Co.*, 1 Wright, 202. Any voluntary deviation is a change of the risk, it forms a departure from the contract, and an attempt to substitute another. It is not necessary that the risk should thereby be increased, it is sufficient if it be changed. Lord Mansfield laid down the rule, "that the true objection to a deviation is not the increase of the risk; it is, that the party contracting has voluntarily submitted another voyage, for that which has been insured:" *Lavabre v. Wilson*, 1 Doug. 291. In *Maryland Ins. Co. v. Le Roy*, 7 Cranch, 30, the supreme court of the United States says, "that the discharge of the underwriters from their liability in such cases, depends not upon any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance." The effect of a deviation is a discharge of the underwriters. But by his breach of this implied warranty against deviation, the owner of the ship becomes liable to the owner of the goods for their loss: 1 Ph. 485; *Crosby v. Fitch*, 12 Conn. 410 [31 Am. Dec. 745.]

It thus becomes necessary to decide whether taking the brig in tow amounted to a deviation, there being nothing in the policy which expressly authorized it. In our opinion it did. Mere delay—taking on board more cargo than is permitted by the policy—shortening sail to keep company with a prize, are all instances which have been holden to amount to a deviation: *Maryland Ins. Co. v. Le Roy*, 7 Cranch, 26; *Oliver v. Maryland Ins. Co.*, Id. 487; 1 Kinne, 539; 1 Ph. 546. Any act which changes the risk, produces that result. "The shortness of the time or of the distance of the deviation, makes no difference as to its effect upon the contract; if voluntary and without necessity, it is the substitution of another risk, and determines the contract:" 3 Kent, 313; *Coffin v. Newburyport Mar. Ins. Co.*, 9 Mass. 449. This point, in a nearly parallel case, was recently decided in the supreme court of Tennessee. It was there holden, that "to lash a flatboat descending the Mississippi, laden with produce, to a steamboat, to be towed, is a departure from, and a violation of,

the contract of insurance:" *Stewart v. Tennessee Marine and Fire Ins. Co.*, 1 Humph. 242. The only difference between that case and this is, that there the boat insured was attached to a steamboat, here the steamboat insured took a brig in tow. In principle there is no distinction. But the case of *Herman Briggs & Co. v. The Western M. & F. Ins. Co.*, 13 La. 516, is still more directly in point. That was an action upon a policy of insurance, upon this very boat, the Fort Adams, instituted to recover for the loss of the boat at the same time at which this suit is brought, to recover for the goods. Of course, the prominent facts are the same. That court held the underwriters to be discharged, upon the ground that there had been a deviation.

It was attempted, in argument, to weaken the authority of this case, by showing that it was founded upon the peculiar laws, and peculiar views of policy of that state. In this we can not concur. It is true, that the civil code of Louisiana is cited, in support of a single principle in the case, in reference to usage; but as to the question of deviation, it is made to rest upon general principles, recognized in the common law authorities, and regarded as of general, if not universal, application. Moreover, a late learned and highly valuable writer, who has indulged very liberally in criticism, of the cases which, in his view, have departed from the true principles of the law of insurance, has cited this case, with seeming approbation, and without calling in question its authority, or its conformity to the rules of the common law: 1 Ph. Ins. 571. We do not, therefore, feel at liberty to disregard it, and are inclined to give it the weight to which we think it justly entitled.

It is now attempted to elude the force of this decision, and, consequently, of the general doctrine which it affirms, by drawing a distinction between an insurance upon a vessel, and an insurance upon the cargo. In the former instance, it is said, the master and mariners are the agents of the assured, the owners of the vessel; but in the latter, they are not the agents of the owners of the goods. No authority was cited in support of the position, except Abbot on Shipping, p. 90, *et passim*. In that author it is very broadly laid down, that the master and crew are the agents or servants of the owners of the vessel; and this is no doubt true. But it by no means follows, that they are not likewise, the agents of the assured. The objection is novel, and we have been at much pains to ascertain to what extent it is well founded. Almost numberless actions have been brought upon policies on goods, in which deviation has been set up as a

defense, yet we have seen no case, in which there was an attempt to defeat the defense, upon this ground: See *Columbian Ins. Co. v. Callett*, 12 Wheat. 383; *Brown v. Girard*, 4 Yeates, 115 [2 Am. Dec. 400]; *Leominster Canal Co. v. Norris*, 7 T. R. 501; *Heslton v. Alnutt*, 1 Mau. & Sel. 46. This list might be greatly extended, and we have examined many other cases on the point of deviation, in none of which has the distinction been taken. This, though a strong, is not a conclusive argument against it.

In *Lodwicks v. Ohio Ins. Co.*, 5 Ham. 234, a case which arose under an insurance of corn upon a flat-boat, the rule as to the agency is very clearly stated. It is said, that the owner is the agent of the shipper, for transporting the goods, and employs, in the management of the business, other agents, the master and mariners, for whose conduct, in that employment, he is accountable to the shipper: Marsh. Ins. 225. "The captain and mariners, navigating vessels in which insured property is laden, are, in legal contemplation, the agents of the assured, in reference to the goods insured." The rule is laid down by Phillips, "that after abandonment, the assured becomes the agent of the underwriters;" or, as it is stated in another passage, "the assured, by the abandonment, becomes the immediate agent of the insurers, and the captain the subagent of the assured:" Vol. 2, pp. 439, 449. The same rule is laid down in *Gardere v. Columbian Ins. Co.*, 7 Johns. 514. In *Schieffelin v. New York Ins. Co.*, 9 Id. 21, the court says: "The master is the agent of the assured, until an actual and valid abandonment, and they ought to bear the consequence of his neglect." The same principle is re-asserted in *Grim v. Phoenix Ins. Co.*, 13 Id. 451. The supreme court of the United States, in substance, says: "By abandonment, the underwriters are substituted for the assured, and the master, although the agent of the owners until the loss occurs, becomes, by abandonment, the agent of the underwriters. The interest in the salvage is transferred to them, and the agency is transferred with the subject; and the agent becomes responsible to the underwriters, for the faithful discharge of his trust. No action could be sustained against him by the assured, for the proceeds, or any misconduct in the management thereof:" *Columbian Ins. Co. v. Ashby et al.*, 4 Pet. 139; 2 Ph. 442. These, except the last, were all cases of insurance upon the cargo.

The principle upon which they rest is very obvious. The master and mariners are intrusted with the goods, and are the agents of the owners. The assured are the owners until a valid abandonment, the insurers become so after that event. The special

clause in the policy, "that in case of loss, the assured and their servants shall labor for the defense, safeguard, and recovery of the goods," is introduced expressly with a view to this rule. Without this clause, the duties of the assured would cease with the abandonment; with it his efforts are still to be exerted, but those exertions are not to be construed to his prejudice: 4 Pet. 139. It is the practice in some policies, where it is desired to secure the distinction, the existence of which is contended for in this case, to insert a clause by which the conduct of the agents, in reference to the cargo, is insured against, but not in reference to the ship: 1 Ph. 578.

It would seem to be unnecessary to pursue this inquiry further. But there is a class of cases which seems to extend the limits of the liability of insurers, for the acts of masters and mariners. They go to fix this principle, that when a loss occurs, the proximate cause of which is a peril insured against, the insurers will be liable, though the remote cause be the act of the agent of the assured, or arise from his negligence and misconduct. In *Bishop v. Pentland*, 7 Barn. & Cress. 219, the rule is thus stated, "the underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks, though the remote cause may be traced to the master and mariners." See *Busk v. Royal Exchange Ass. Co.*, 2 Barn. & Ald. 73; *Walker v. Mailland*, 5 Id. 171; *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222; *Waters v. Merchants' Louisville Ins. Co.*, 11 Id. 213. But this doctrine has never been extended to a case of voluntary deviation, and seems to be in its nature inapplicable to cases of that kind.

Phillips concludes his remarks on this class of cases, in these words: "But the application of these principles to particular cases, does not seem to have been very definitely settled. It is plain that the master is the agent of the owners, both of the ship and the cargo, to more purposes than the mariners. Chief Justice Gibbs has also glanced at a distinction in this respect, between the owners of the ship and the owners of the cargo. Speaking of a loss by the misconduct of the master and mariners, he says: "It is extremely hard that the owner of goods should be responsible for a loss, occasioned by an act in which he did not concur, and by which he was alone the sufferer:" *Soares v. Thornton*, 1 Moore, 385; S. C., 7 Taunt. 627. Sir William Scott also notices the same distinction: *The Adonis*, 5 Rob. A. 256. But upon what principles, and to what extent, such a distinction is to be made, has not as yet been definitely determined. The

owners of the ship are the agents of the shipper, for transporting the goods, for which purpose they employ other agents, namely, the masters and mariners, for whose conduct in this employment, they are, no doubt, answerable, in a greater or less degree, to the shipper. And it seems to be more generally implied, that, in respect to the acts of the agents, for which the owners of the ship are answerable to the shippers, the insurers of the goods are not answerable:" *Cleveland v. Union Ins. Co.*, 8 Mass. 321; 1 Ph. Ins. 225. The concluding paragraph excludes the idea that the principle can extend to a case of deviation, when it is voluntary. There not only the remote, but the sole cause, is the act of the master and mariners.

It is also clear that for such an act of deviation; the owner of the ship would be liable to the owner of the goods: *Hobard v. Norton*, 8 Pick. 159; S. C., 1 Ph. 485. According to many of the cases, this last principle may be propounded in more comprehensive terms. That the insurer is only liable for extraordinary perils, unless by express stipulation, and not for such as proceed from the negligence, unskillfulness, or misconduct of the master and crew: 8 Mass. 322, *supra*; *Lodwicks v. Ohio Ins. Co.*, 5 Ham. (Ohio) 434; 1 Ph. 625. For these last the ship-owner is responsible, as a carrier, and the liability of the insurer does not commence until that of the carrier ceases. But this I regard as the debatable land, and in cases of this description the doctrine of losses, from proximate or from remote causes, seems to vibrate and hang in suspense. The point of voluntary deviation, however, is exempt from any such perplexing refinements and distinctions: *Stewart v. Tennessee Mar. and F. Ins. Co.*, 1 Humph. (Tenn.) 248.

In regard to the remarks stated in the above extract to have fallen from Chief Justice Gibbs, upon the distinction under consideration, there are, it seems, two reports of the case. The one in 7 Taunt. 627, is the only one I have been able to find. It was an action on a policy of insurance, covering barratry expressly, and the declaration averred a loss by barratry; the action was by the owner of the goods. The vessel was under a charter of af-freightment, and the party who chartered her was on board; the general owner was likewise on board. On one occasion the owner took the command of the vessel, and the captain assenting, willfully ran her ashore, and the goods were lost to the plaintiffs. The material question was, whether this was a loss by barratry. The chief justice says: "Barratry is an act of fraud, not directed against the owner of the goods, which are lost, but a fraud against

the owner of the ship; and however innocent may be the owner of the goods, who seeks to recover against the underwriter, yet if the owner of the ship concur in the act which caused the loss, it takes from it the character of barratry; for the very definition of barratry is, a fraud by the master and mariners against the owner of the ship." But it was holden that the freighter was for the time the owner of the vessel, and that as he did not consent to the act of fraud, or concur in it, the act of the original owner and master together, was a complete act of barratry. It fell, therefore, within the peril insured against. In conclusion, the judge remarked: "We can not regret this result, for it is a very hard thing, when a person has insured his goods, to find himself exposed to a loss, to which he supposed his indemnity would extend, but in which he is frustrated." The whole case clearly shows, that if it had been holden not to be barratry, the plaintiff would not have been permitted to recover. It therefore attempts, as there reported, to introduce no distinction in this particular, but it lets the law remain undisturbed, as previously settled.

But if intended by the learned judge to introduce a distinction, it goes no further than the case of barratry. That according to the late English cases, and to most of the American cases, is an offense which can only be committed against the owners of the vessel, though the New York cases extend it likewise to the owner of the cargo: *Cook v. Commercial Ins. Co.*, 11 Johns. 40 [6 Am. Dec. 353]; 1 Ph. Ins. 603 *et seq.*; *Soares v. Thornton*, 7 Taunt. 627; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 220. Barratry is not covered by the ordinary provisions of a policy; it requires an express stipulation to comprehend it, and without such stipulation the underwriters are not bound: *Williams v. Suffolk Ins. Co.*, 13 Id. 421; 3 Kent, 304; 1 Kinne, 542. In such case where the owners of the vessel lose their claim to indemnity, under the policy, the hardship of making the owners of the goods likewise lose their insurance, does appear to plead strongly for a relaxation of the rule in their favor. But under even those circumstances, it seems to us better to require the introduction of an express clause into the policy of insurance against barratry, or of protection of the owners of the goods, when no room would be left for doubt, and the insurer, by an increase of premium, would be compensated for the increase of risk: 1 Ph. 618. But we have nothing further to do with this point, than to distinguish it from the case before us. After this examination of the general doctrines involved in the case,

it is not necessary to enter upon a close consideration of the charges given by the court below. It will be easy to perceive in what they differ from the principles here laid down, and upon any future trial, they must be made to conform to them. The advertisement referred to in argument, that the company would insure goods upon certain enumerated boats, could at most only amount to a waiver of the implied warranty of seaworthiness. We do not see, therefore, that it can have any influence in the cause.

In regard to the question of usage, there is no proof of any usage on this subject, at Natchez, where the defendants reside, and where the contract was made. The usage of the insurance offices, at New Orleans, could not affect them, neither could the usage of towing boats upon the river by steamboats, unless it was shown to be so general, and so well known, that it was fair to presume the parties contracted with reference to it: *Martin v. Delaware Ins. Co.*, 2 Wash. C. C. 257; *Trott v. Wood*, 1 Gall. 444; 6 Law Rep., No. 3, p. 117; 1 Ph. Ins. 54.

The judgment is reversed and a new trial awarded.

SEAWORTHINESS IS AN IMPLIED WARRANTY in every policy of insurance upon a vessel: *Warren v. United Ins. Co.*, 1 Am. Dec. 184; *Barnewall v. Church*, 2 Id. 180, and note; *Prescott v. Union Ins. Co.*, 30 Id. 211, note; *Dupeyre v. Western Marine and Fire Ins. Co.*, 33 Id. 218; and also see note to *Fleming v. Marine Ins. Co.*, 33 Id. 37. Neglect to employ a competent pilot in entering a port where it is the custom of vessels to take a pilot on board, is a breach of the implied warranty of seaworthiness: *Whitney v. Ocean Ins. Co.*, 33 Id. 595, and note 599; *McMullan v. Union Ins. Co.*, Id. 112. A competent crew is essential to the seaworthiness of an insured vessel: *Caldwell v. Western M. & F. Ins. Co.*, 36 Id. 667.

DELAY AND DEVIATION.—As to what has been held a deviation, see *Earl v. Shaw*, 1 Am. Dec. 117; *Hood v. Nesbit*, Id. 265; *Patrick v. Ludlow*, 2 Id. 230; *Read v. Commercial Ins. Co.*, 3 Id. 495; *Clark v. United F. & M. Ins. Co.*, 5 Id. 50; *Savage v. Pleasants*, 6 Id. 424; *Himely v. South Carolina Ins. Co.*, 12 Id. 623.

NIXON v. THE STATE.

[2 SNEDES & MARSHALL, 497.]

A SPEEDY TRIAL IS ONE CONDUCTED ACCORDING TO FIXED RULES, regulations, and proceedings of law, free from vexatious, capricious, and oppressive delays, created by the ministers of justice.

STATUTE GIVING PRISONER THE RIGHT TO AN EXAMINATION OF THE INDICTMENT, "at least two entire days before the trial," means two judicial days, and hence excludes the fraction of a day of its service.

WHERE TRIAL CAN NOT POSSIBLY BE COMMENCED TILL THE LATTER PART of the last day of the term, its postponement till the next term is no infringement of the prisoner's right to a speedy trial.

IF THE CLERK OF CIRCUIT COURT FAILS TO DRAW THE JURORS as required, the certificate of the clerk of the probate court, that the list of jurors by whom a bill of indictment was found, was drawn in open probate court in the manner prescribed by law, is evidence that the panel was properly drawn.

INDICTMENT for murder. The prisoner was brought before the circuit court on a writ of *habeas corpus*. The court overruled his application for a discharge and remanded him to jail, from which order and judgment this writ of error is prosecuted. The other facts sufficiently appear in the opinion.

Davis, for the prisoner.

Freeman, attorney general, for the state.

By Court, **THACHER, J.** This was writ of error from the judgment of the judge of the ninth judicial district, upon an investigation, by virtue of a writ of *habeas corpus*. The plaintiff in error is under indictment for murder. He claimed his discharge upon two grounds; that he had been deprived, through the default of the state, of his constitutional privilege of a speedy trial; and that the indictment, by process under which he was now held in imprisonment, is null and void. One who is prosecuted by indictment or information has, by the constitution, his right to a speedy and impartial trial. He shall not be unnecessarily hindered and delayed in his efforts to relieve himself from the burden of an onerous charge of crime. But the constitution also declares, that he shall not be deprived of his life or liberty, but by due course of law: Const., art. 1, sec. 10. Delays growing out of the established mode of proceeding, which has been so established by law, equally for the protection of the accused, and to accomplish the design of the scheme of laws, are evils necessarily attendant upon all human systems of jurisprudence. They are evils to which all may be subjected alike, and which constitute a part of the price paid for the advantages, far greater in proportion, thereby derived. By a speedy trial is then intended, a trial conducted according to fixed rules, regulations, and proceedings of law, free from vexatious, capricious, and oppressive delays, manufactured by the ministers of justice.

In examining the record, we can see but one cause of delay, which did not originate, directly and immediately, from the accused himself; and that exception seems to be the one most urgently pressed upon this court. The state of facts relied upon most forcibly in the argument, as exemplifying the state's default, was, that the pending indictment was found by the

grand jury of Pontotoc county, on Tuesday, the twenty-first day of March, 1843; that the accused was arraigned thereon on Thursday, the twenty-third day of the same month, and pleaded thereto, and that he thereupon demanded his trial, which was refused him, as he declined to waive his statutory right to a copy of the indictment for two entire days before his trial: How. & Hutch. 667, sec. 15. The trial, under these circumstances, could not have taken place at that term of the court. The circuit court of Pontotoc county could continue in session six judicial days, and no longer: Laws of 1842, 221, sec. 2. The statute gave the accused a right to an examination of the indictment, "at least two entire days before the trial." The service of copy must have been made some time on Thursday, and he would have been entitled to the days of Friday and Saturday for its examination, with the advice of counsel. The statute intends two entire judicial days. The fraction of the day of its service must be excluded in the computation, not only for the reason already given, but because the greatest liberality of construction should be accorded to an accused, in passing upon his rights and privileges before, during, and after his trial. Had a different estimate been made, by including the portion of Thursday, which, as we have said, would have been erroneous, then the trial could not have commenced until some time during Saturday, the last of the judicial days of that term. It must, necessarily, have been precipitated with haste, and without that deliberation and reflection on the part of the court, which is due, as a right, in the course of law to an accused, in so solemn and awful a position.

The main reason urged against the validity of the indictment, is based upon an alleged informality of the certification of the manner in which the jurors for the term of the court at which the indictment was returned, were drawn. There having been an omission by the clerk of the circuit court, and the sheriff of the county of Pontotoc, to draw the jurors, as required by the general circuit court law, in such case provided; the certificate of the clerk of the probate court shows, in the record, that the clerk of the circuit court, and the sheriff of the county, in presence of the judge of probate, and during the term time of his court, did draw the requisite number of jurors, for the said March term, 1843, of that circuit court: How. & Hutch. 491, sec. 46. The inspection and supervision of this proceeding, shows a judicial exercise of the duties of the judge of probate, which is properly, and must necessarily, under such circumstances, be

certified unto by the clerk of that court. If done in vacation, the certificate may be by the judge of probate himself, but when done in term time, it must be certified by the clerk.

After a careful and elaborate examination of the record, in this case, we can see nothing that calls for a reversal of the judgment of the judge of the ninth judicial district.

The judgment is therefore affirmed.

SPEEDY TRIAL, RIGHT TO.—The right of all persons held on a criminal charge, to a speedy and impartial trial, has been guaranteed from the earliest times to the English people, first by the Magna Charta and the petition of rights, and enforced by statutes allowing a certain time within which the trial should come off, or in default of this, and no legal and sufficient reason being shown, granting a discharge from custody. The same right has been declared in most of the constitutions of the American states, and also in the sixth amendment to the federal constitution. The latter is in these words: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." The supreme court of the United States has uniformly held that the prohibitions contained in this and the other amendments to the federal constitution are exclusively restrictive on the federal powers, to prevent interference with the rights of states and their citizens, and that it does not apply to acts of the legislatures of the several states: *Barron v. Baltimore*, 7 Pet. 243; *Fox v. Ohio*, 5 How. 410; *Smith v. State of Maryland*, 18 Id. 76; *Withers v. Buckley*, 20 Id. 90; *Twitchel v. Commonwealth*, 7 Wall. 321; *Walker v. Sauvinet*, 92 U. S. 90. To the same effect are the following state decisions: *Murphy v. People*, 2 Cow. 815; *Jackson v. Wood*, Id. 819; *Campbell v. State*, 11 Ga. 353; *Guillote v. New Orleans*, 12 La. Ann. 432; *Ex parte Smith*, 10 Wend. 449.

To guard more carefully this ancient right, most of the state constitutions have embodied in their declarations of rights, the same or very similar language: Constitution of Florida, art. 1, sec. 10; Missouri, art. 1, sec. 18; Nebraska, art. 1, sec. 7; California, art. 1, sec. 13; Pennsylvania, art. 1, sec. 9; Texas, art. 1, sec. 10; Virginia, art. 1, sec. 10; Wisconsin, art. 1, sec. 7; Ohio, art. 1, sec. 10; Alabama, art. 1, sec. 7; Arkansas, art. 2, sec. 10; Colorado, art. 2, sec. 16; Connecticut, art. 1, sec. 9; Delaware, art. 1, sec. 7; Georgia, art. 1, sec. 7; Illinois, art. 2, sec. 9; Iowa, art. 1, sec. 10; Kansas, sec. 10 of the bill of rights; Kentucky, art. 13, sec. 12; Louisiana, tit. 1, art. 6; Maine, art. 1, sec. 6; Maryland, art. 21 of the declaration of rights; Michigan, art. 1, sec. 10; Minnesota, art. 1, sec. 6; Mississippi, art. 1, sec. 7; New Jersey, art. 1, sec. 8; Rhode Island, art. 1, sec. 10; South Carolina, art. 1, sec. 13; Tennessee, art. 1, sec. 9; Texas, art. 1, sec. 10; Vermont, c. 1, art. 10. In most of the constitutions just cited the phrase used is "a speedy and public trial by an impartial jury." The constitution of West Virginia gives the right to a trial "public, and without unreasonable delay." Those of Indiana and Oregon give "a public trial by an impartial jury," omitting the word "speedy;" while the constitutions of New York, North Carolina, New Hampshire, Nevada, and Massachusetts have no such phrase nor its equivalent.

To carry out these provisions of the constitutions most of the states have statutes declaring that unless an accused is tried within the first or second, or in some states where he is out on bail, within the third term after the indictment or information has been found, he shall be discharged, unless the continuance has been for good and legal reasons, or on the application of the defendant. In Pennsylvania the statute declares that any person committed for felony or treason must be discharged if not indicted at the first term after his commitment, unless it shall appear upon oath to the court that material witnesses for the commonwealth could not then be produced; if such person is not indicted and tried the second term, he must be discharged, unless the delay happened on the application of the accused. Under this act it has been held that the power to discharge the prisoner is strictly confined to the court in which he was indicted, and that the supreme court would not interfere if the commitment is unexceptionable on the face of it: *Ex parte Walton*, 2 Whart. 501; that a prisoner indicted for aiding and abetting another to commit murder, who has not been tried at the second term, is not entitled to his discharge, if the principal has absconded, and the proceedings to outlawry against him were commenced without delay, but sufficient time had not elapsed to complete them: *Commonwealth v. Sheriff et al.*, 16 Serg. & R. 304. Also that if the prisoner has an infectious or contagious disease, which may be communicated in the court to the prejudice of those present, he is not entitled to demand a trial at the second term: *Ex parte Phillips*, 2 Watts, 366. In South Carolina it is at the discretion of the court to continue a case on the part of the state: *State v. Patterson*, 1 McCord, 177.

In Massachusetts, where a capital indictment had been continued one term, and the government was not prepared for trial, the court took the prisoner's single recognizance for his appearance at the next term: *Commonwealth v. Phillips*, 16 Mass. 428. But where it appeared that a material witness on the part of the government had absconded, though without any connivance on the part of the prisoner, the indictment was continued and the prisoner remanded, even though the statute required that prisoners should be tried the first term: *Commonwealth v. Carter*, 11 Pick. 277. The Virginia statute provides that if the prisoner shall apply to the court to be tried the first term, he must either be tried then or admitted to bail, unless it appear by affidavits that witnesses against him can not be produced in time; that every person not indicted before or at the second term after he shall have been committed shall be discharged from imprisonment, unless he has prevented the attendance of witnesses against him; and if he be not tried at or before the third term he shall be forever discharged of the crime, unless such failure to try the case was on his own account or from the inability of the jury to agree. Under this act it has been held that the word term does not mean the prescribed time when the court should meet, but the actual session: *Ex parte Santee*, 2 Va. Cas. 363. And that when the prisoner has been tried and convicted and a new trial awarded him, although he shall not be again tried till after the third term from his examination, he is not entitled to a discharge: *Vance v. Commonwealth*, Id. 162. The statute of Missouri provides that the accused must be tried before the end of the second term, or, if out on bail, the end of the third term, or he is entitled to his discharge, unless the delay shall happen on the application of the prisoner, or be occasioned by want of time to try the cause at such term. Under this statute it has been held that if the venue has been changed on the application of the prisoner he is not entitled to his discharge, as for want of prosecution, if tried at the second term of the latter court after the filing of the papers therein: *State v. Cox*, 65 Mo. 29. Also that the supreme court would not reverse a judgment because the prisoner

was not tried within the period fixed by the statute, unless it appear by the record that he applied to the lower court for a discharge on that ground: *Id.* The statute was intended to operate only when there is some laches on the part of the state; hence, in considering whether a prisoner is entitled to a discharge under it, a term adjourned in the midst of a trial, by reason of the illness of the judge, must not be counted; nor a term in which there was a trial and the jury disagreed; nor a term limited by law to six days, in which, on the fourth day, only five jurors had been impaneled, and the case was then continued; nor a special term: *State v. Huting*, 21 *Id.* 464. The prisoner must make his application for a discharge, by reason of failure to prosecute, in the court in which the indictment is pending: *In re Spradlend*, 38 *Id.* 547.

Judge Cooley, in his able work on constitutional limitations, page 382, fourth edition, in discussing the constitutional prohibitions, says: "Again, it is required that the trial be *speedy*; and here also the injunction is addressed to the sense of justice and sound judgment of the court. In this country, where officers are specially appointed or elected to represent the people in these prosecutions, their position gives them an immense power for oppression; and it is to be feared they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused. But we trust it is not often where cases occur like a recent one in Tennessee, in which the supreme court felt called upon to set aside a verdict in a criminal case, where by the artifice of the prosecuting officer the prisoner had been induced to go to trial under the belief that certain witnesses for the state were absent, when in fact they were present and kept in concealment by this functionary: *Curtis v. State*, 6 *Coldw.* 9. When a person charged with crime is willing to proceed at once to trial, no delay on the part of the prosecution is reasonable, except only that which is necessary for proper preparation and to secure the attendance of witnesses. Very much, however, must be left to the judgment of the prosecuting officer in these cases; and the court would not compel the government to proceed to trial at the first term after indictment found or information filed, if the officer who represents it state, under the responsibility of his official oath, that he was not and could not be ready at that time: *Watts v. State*, 26 *Ga.* 231." Perhaps as good a judicial exposition of what is meant by a *speedy* trial is given in a recent case that arose in the state of Nevada. The accused was indicted for murder, and tried at the first term thereafter and convicted of manslaughter. A new trial was granted. The next term, the panel summoned being exhausted and no jury obtained, the case was continued. The same thing occurred the next term, whereupon the court continued the case. The prisoner then sued out a writ of *habeas corpus*, claiming his final discharge on the ground that he was denied his legal right to a *speedy* trial. Lewis, J., in delivering the opinion, says: "But what is to be understood by a *speedy* trial, is the embarrassing question now to be determined. It is very clear that one arrested and accused of crime has not the right to demand a trial immediately upon the accusation or arrest being made. He must wait until a regular term of the court having jurisdiction of the offense with which he is charged, until an indictment is found and presented, and until the prosecution has had a reasonable time to prepare for the trial. Nor does a *speedy* trial mean a trial immediately upon the presentation of the indictment or the arrest upon it. It simply means that the trial shall take place as soon as possible after the indictment is found, without depriving the prosecution of a reasonable time for preparation. The law is the embodiment of reason and good sense; hence, whilst it secures to every person accused of crime the right to have such charge speedily determined by a competent jury, it does not ex-

act impossibilities, extraordinary efforts, diligence, or exertion from the courts or the representatives of the state; nor does it contemplate that the right of a speedy trial, which it guarantees to the prisoner, shall operate to deprive the state of a reasonable opportunity of fairly prosecuting criminals." *Ex parte Stanley*, 4 Nev. 113.

WORTEN v. HOWARD.

[2 SMITHS AND MARSHALL, 527.]

ADMINISTRATOR'S OR EXECUTOR'S SALE IS VOID unless the provisions of the statute are strictly pursued.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT AN EXECUTOR'S SALE WAS PRIVATE, and not public, as required by statute, where his return does not show that the sale was made according to the statute.

BILL OF EXCEPTIONS, TAKEN UPON ONE POINT ONLY, THE IMPROPER EXCLUSION of a particular item of testimony, is sufficient to reverse the judgment, if true, without stating all the evidence.

LEGATEE MAY SUE FOR AND RECOVER AT LAW THE LEGACY BEQUEATHED HIM, without showing the assent of the executor to such legacy, in Mississippi, by statutory provision.

ACTION OF DETINUE SURVIVES TO THE PERSONAL REPRESENTATIVES in Mississippi by express statute.

DETINUE. John Ashley, a minor, by his *prochein ami*, Hardy Worten, brought this action against Titus Howard, to recover a negro girl, bequeathed him by his father. Young Ashley died pending the suit, and upon this being suggested, it was revived in the name of Colin Worten, his administrator. Judgment for the defendant. The other facts appear in the opinion.

Sheppard, for the plaintiff in error.

Thompson, for the defendant in error.

By Court, CLAYTON, J. This was an action of detinue originally brought by John H. Ashley, against the defendant in error, to recover a negro girl bequeathed to him by the will of his father, Josiah Ashley. The will was admitted to record in 1836, and this suit was instituted in 1841. It seems that the girl in controversy, had been sold by the executor, and the defendant produced and read his return to the probate court of Carroll county, in proof of that fact. The plaintiff then introduced two witnesses, and offered to prove by them, that the sale was made by the executor at private, and not at public sale, as prescribed by law; but the court excluded this testimony from the jury, to which a bill of exceptions was filed. The jury found a verdict for the defendant, and the cause comes by writ of error to this court.

The statute regulating sales by executors and administrators, directs that they shall be made to the highest bidder at public auction: How. & Hutch. 411. And this court has heretofore decided, that unless the statute be pursued in this respect, the sale is void; and confers no title on the purchaser: *Cable v. Martin*, 1 How. 561. The return of sales does not show upon its face, that the sale was made according to the statute. It was therefore clearly open to the plaintiff to attack it, and to show, by evidence, that it was not so made. The evidence offered was legitimate, and it was an error in the court to reject it. If the return had stated that the sale was made publicly, we need not now decide whether such return would have been conclusive, or only *prima facie* in its character. Several objections, however, are urged in this court, against the recovery of the plaintiff, which we shall proceed to notice: 1. It is said that the plaintiff did not introduce any evidence, showing that the slave ever belonged to the testator. Without inquiring whether such testimony were necessary, it is a sufficient reply, that the bill of exceptions does not profess to set out all the proof in the cause. It was taken upon a single point only, the improper exclusion of a particular item of testimony; and if well founded, it is sufficient to reverse the judgment.

The next objection is of a similar character, namely, that the plaintiff introduced no evidence to show the assent of the executor to the legacy. A similar reply might be made. It may be well to add, however, that we do not think the assent of the executor to a specific legacy, is necessary in this state, to enable the legatee to maintain a suit for it at law. The general rule in England was, that the legatee must resort to a court of equity for relief; but the rule was modified so far as to allow an action at law, after the executor had given his assent: *Doe ex dem. Lord Saye v. Guy*, 3 East, 120; *Gorton v. Dyson*, 1 Brod. & B. 219. But our statute has introduced a change in very broad and unlimited terms. It enacts "that any person having a legacy bequeathed in any last will and testament, may sue for, and recover the same at common law:" How. & Hutch. 412. This places the remedy on higher ground than at common law, and if the property be necessary for the payment of debts, or a final settlement has not been made, the executor must rely on it in his defense, to defeat the recovery.

The last objection is, that the action of detinue does not survive at common law. It is worthy of remark that this objection was not made in the court below, and the trial was had without

reference to it. We should be very reluctant now to sustain it, even if warranted by strict law, because there is strong reason to hold that the party waived it. The only authority referred to by counsel, in support of this objection, is *Jones v. Littlefield*, 3 Yerg. 133. The case decides only that the action can not be revived against persons in their representative capacity, but a new action must be brought against them as individuals. The reason assigned is, that they can not be guilty of a wrongful detention, in a representative character. The reason of this rule does not extend to suits in which the party plaintiff dies. But our statute expressly provides "that all actions shall survive, except actions of slander, and for injuries or torts done to the person:" How. & Hutch. 414, secs. 88, 95. We can see no room for doubt as to its intention.

For the improper exclusion of the testimony, the judgment will be reversed and a new trial granted.

AUTHORITY OF ADMINISTRATOR TO SELL his intestate's estate must be strictly pursued: *Wyman v. Campbell*, 31 Am. Dec. 677. The sale is invalid if a greater quantity of real estate is sold than is authorized by the license: *Wakefield v. Campbell*, 37 Id. 60; for rights of purchasers at void administrators' or executors' sales, see note to *Scott v. Dunn*, 30 Id. 177-182. The statute must be strictly pursued: *Cable v. Martin*, 1 How. 558; *Baines v. McGee*, 1 Smed. & M. 208.

THE PRINCIPAL CASE IS CITED in *Magee v. Gregg*, 11 Smed. & M. 70; and *Dean v. Minnally*, 38 Miss. 358, to the effect that the statute of Mississippi has changed the common law in that state, so as to allow a legatee to maintain an action at law for his legacy without the assent of the executor, and that the latter's only defense is, that the property is necessary for the payment of debts.

NEAL v. SAUNDERSON.

[2 SNEDES AND MARSHALL, 572.]

COMMON CARRIERS ARE NOT LIABLE FOR LOSS OCCURRING by the act of God or by the public enemies of the country.

"INEVITABLE ACCIDENT" IS A TECHNICAL EXPRESSION, and is synonymous with "the act of God."

COMMON CARRIER DOES NOT ASSUME ALL RISKS, where the bill of lading does not contain the clause "excepting the dangers of the river," so as to preclude him from showing that the loss occurred by "inevitable accident."

LAW CONCERNING COMMON CARRIERS ENGRAFTS UPON THEIR CONTRACT A CONDITION that the carrier shall not be responsible for inevitable accidents, and nothing but an express undertaking will dispense with this condition.

BILL OF EXCEPTIONS SHOULD CONTAIN THE REJECTED EVIDENCE that is assigned as error, when the question is whether the evidence is material to prove the issue.

BILL OF EXCEPTIONS NEED NOT CONTAIN THE EXCLUDED EVIDENCE assigned as error, when the question is whether any evidence can be introduced to prove a certain fact, for then the courts are only called upon to say whether it is competent to prove such fact.

ASSUMPTUM. The facts appear in the opinion.

Gholson, for the plaintiff in error.

Davis, for the defendant in error.

By Court, **SHARKEY, C. J.** The plaintiff in error was sued as a common carrier, to recover the value of fifty-nine bales of cotton, shipped on board of a flatboat, of which he was the owner. The plaintiff below introduced the bill of lading, and also witnesses, who proved the receipt of the cotton by the plaintiff, and the value of cotton in market. The defendant's counsel proposed to prove, by cross-examining the first witness introduced by the plaintiff, that the boat "was lost by inevitable accident, and without the negligence or misconduct of the defendant, as master of said boat; to the introduction of which testimony, the plaintiff, by his counsel, objected, and the said objection was sustained by the court, and the said defendant was by the court precluded from giving evidence as to the loss of said boat by inevitable accident, or any evidence except what went to show the delivery of the cotton, to which opinion the defendant excepted."

This extract from the bill of exceptions shows the principal point in the cause. The court seems to have acted under the impression that nothing will excuse a common carrier for the loss of goods received by him for transportation. This is, at least, the necessary effect of the broad and unqualified declaration that no evidence could be received, except evidence of the delivery of the article. This proposition is entirely too broad. It is true that a common carrier is held to the strictest accountability, the common law being the law by which contracts of bailment are governed. But strict as this law undoubtedly is, it is not so rigid as to cut off all defense. There are two grounds on which a common carrier may rest his defense, either that the loss occurred by the act of God, or by the public enemies of the country: Story on Bail. 320. In questions, says the commentator, as to the liability of a carrier, the point ordinarily is not so much, whether he has been guilty of negligence or not, as whether the loss comes within either of the excepted

cases. What are properly denominated losses by the act of God, may happen in various ways, any of which will be an excuse to the carrier. The phrase used in the bill of exceptions, is equally as comprehensive. Indeed, "inevitable accident" is now used as a phrase synonymous with "the act of God." Judge Story says, by the act of God, is meant inevitable accident, or casualty: *Id.* 318. See also *Gilmore v. Carman*, 1 Smed. & M. 279 [40 Am. Dec. 96]. "Inevitable accident," is now a technical expression, and being a good defense to a common carrier, we must suppose that as the defendant offered evidence of loss by inevitable accident, in his defense, the technical meaning was intended to be employed in the offer to introduce evidence. In that sense only was such evidence admissible, and when technical terms are used, in connection with an apparent intention to employ the technical sense, we are not at liberty to say that they were only intended to be used according to their common acceptance.

An expression of the judge, who delivered the opinion in the case of *McArthur v. Sears*, 21 Wend. 190, is relied on as showing that accidents, arising from human agency, are sometimes inevitable. To a certain extent this may be true. At the particular time, and under the particular circumstances that an accident occurs, it may be inevitable; that is, under the existing state of preparation for the protection of the article, it may be impossible for the carrier to prevent the accident, but could it not have been guarded against by human foresight and sagacity? That is the question: *Story on Bail.* 330. And if the accident could have been guarded against, even by an extraordinary degree of skill and care, then in the strict sense of the term, it can scarcely be said to have been inevitable. But suppose it be true that "accidents arising from human force or fraud, are sometimes inevitable," still it would not follow that the evidence of inevitable accident was properly excluded in this case. As a general rule, such accidents arise from natural causes; the exceptions, if there be any, are very few, and the court should not have excluded the evidence on the presumption that it might show an accident falling within an exception to the general rule. If then we are right in the position that, by inevitable accident, is meant a casualty arising from natural causes, and is the same in meaning with an accident by the act of God, then the defense attempted was a good one, and the court erred in rejecting it. Whether the accident by which the boat was lost, was inevitable in the legal signification of the word, is another question; and it is one

about which we can not determine, because we are not informed by what particular accident the loss occurred. The defense was placed on the ground of loss by inevitable accident; this, we say, is a good defense for a common carrier, but whether the proof would have brought the defendant within the law, is a question which of course would depend on the proof, which the court would not hear. This was in effect to deny the defendant the right to make any such defense. The defendant, although he relied on this defense, might nevertheless have failed in making it good. It might have turned out that the boat was lost by accident, and not from the negligence of the defendant, but still the accident may not have been inevitable.

It is however insisted that nothing will excuse the defendant, because by his contract he took all risks, even those which might arise from inevitable accident. This position is assumed on the ground that the bill of lading does not contain a clause excepting the dangers of the river, and the absence of such exception is construed into an undertaking to deliver at all events. It is usual for carriers by water, to except in express terms, the dangers of the river or of the seas. This has the effect to exempt them from losses arising, not only from natural causes, but from accidents which are usually considered as peculiar to the river, or the sea. The phrase, "perils of the seas," in its more enlarged sense, signifies something more than accidents arising from natural causes. Hence the propriety and use of such an exception in a bill of lading. But it is said, if this phrase is to be used only in its limited sense, as denoting only accidents from natural causes, peculiar to that element, then there is no use for the exception in the bill of lading, as common carriers are excused by law from losses by such accidents: Story on Bail. 330, 331. If then the bill of lading had contained the usual exceptions, it would seem that it would have been useless, when exemption from loss is claimed on the ground of inevitable accident. This is necessarily the rule. The law of the contract is part of the contract, and in the absence of express stipulations, the law governs. It is not to be presumed that the party undertook beyond the terms of his contract. His silence is not to be construed into an engagement to do more than the terms of his contract and the law required. The law engrafs on the contract a condition that the carrier shall not be responsible for inevitable accidents, and nothing but an express undertaking will dispense with this condition. The contract is not to be expounded unfavorably to the bailee, beyond the obvious scope of

its terms: Id. 22. We regard the absence of the usual exception as leaving the parties to their legal rights and responsibilities. They stood just as they would, if they had acted on an implied contract. So that if the court acted on the supposition that the bill of lading was such an undertaking as to exclude a defense arising from inevitable accident, it was a mistaken notion of the law.

It is also insisted that, even if it was error to disallow the proof of the loss by inevitable accident, still it can not now be corrected, because it does not appear by the bill of exceptions, how or by what accident the loss occurred, and that the court will not reverse, for an improper rejection of evidence, unless the evidence be set out. As a general rule, it is no doubt proper that the rejected evidence should be brought to the notice of the court, so that it may judge of its materiality. This was held to be the rule in the case of *Smith v. The Natches Steamboat Company*, 1 How. 479. This rule does not fully meet the question. Here the party was deprived of any and all evidence which went to establish a certain fact, which fact was a legal defense. The rule was applied in the case referred to, on the ruling out of a deposition, which deposition was not set out in the record, and it could not be known therefore what fact it conducted to prove. Here we know what fact was intended to be proved. When the question is whether the evidence is material to prove the issue, then it should be set out, but when the question is whether any evidence can be introduced to prove the issue, or a material fact, then it can not be important that it should be set out, because the court is then called on to say whether it is competent to prove such fact. In the first case, the court is only to determine whether the evidence tended to prove a given fact. Here it seems the defendant offered to introduce evidence to prove that the boat was lost by inevitable accident; the court held that any proof of that fact was inadmissible, thus virtually deciding that it constituted no defense, even if proved. Now, although we do not know what proof the defendant intended to introduce, yet we do know what fact he intended to prove. This fact constituted a good defense, and was properly in issue under the pleadings; but the court said you shall not introduce any evidence of this fact; there is but one point to which you can be permitted to give any evidence, and that is as to the delivery of the cotton. In this, the court erred; and the judgment must be reversed, and the cause remanded for a new trial.

COMMON CARRIER IS LIABLE for every injury which happens to goods intrusted to his care, unless it is caused by the act of God, or by the public enemy: *Colt v. McMechen*, 5 Am. Dec. 200; *Craig v. Childress*, 14 Id. 751; *Jones v. Pitcher*, 24 Id. 716; *Robertson v. Kennedy*, 26 Id. 486; except where he has provided otherwise in his contract: *Turney v. Wilson*, 27 Id. 515; *Daggett v. Shaw*, 25 Id. 439; *Gilmore v. Carman*, 40 Id. 96; *Southern Express Co. v. Moon*, 39 Miss. 822.

ACT OF GOD, inevitable accident, dangers of the sea, etc., are expressions of very similar import, and excuse a loss, whether they are repeated in a bill of lading or not: *Crosby v. Nick*, 31 Am. Dec. 745.

DOE EX DEM. ROBINSON v. PARKER.

[3 SMITHS AND MARSHALL, 114.]

CERTIFICATE OF LAND OFFICE IS EVIDENCE under the statutes of Mississippi.

EVIDENCE OF TITLE IN DEFENDANT IN EXECUTION at the time of the sale is not necessary in an action against him by the purchaser under the execution.

WHERE PURCHASER AT SHERIFF'S SALE IS ONE OF THE DEFENDANTS in the execution, the sale is nevertheless valid.

IT IS NO OBJECTION TO THE REVERSAL OF A JUDGMENT, that the judge who signed the bill of exceptions to the overruling of the motion for a new trial is not the same judge who presided at the trial; where he certified no new fact, but only stated that the motion for a new trial had been overruled.

OMISSION OF WORDS "AFORESAID PROPERTY" IN A FORTHCOMING BOND after the words "shall have forthcoming and deliver," does not vitiate the bond, as these words will be supplied by intendment.

EJECTMENT. Plea, the general issue. One Freeland obtained a judgment against Robinson and Parker. Execution issued, and a forthcoming bond was taken, which having been forfeited, execution was issued on it, the land in controversy was sold by the sheriff, and Robinson became the purchaser. Parker refusing to give up possession, this action was brought. On the trial, the plaintiff offered in evidence a certified copy of the certificate of the register of the land office, and of the entry of the land by defendant Parker, and also a transcript of the records of the receiver's office. These were both objected to and rejected by the court. Plaintiff then produced the sheriff's deed; but it was objected to on the ground that plaintiff, being a co-defendant in the former suit, could not purchase at the execution sale, and that such a purchase conveyed no title. The court sustained the objection, and refused to allow the deed to be read in evidence. The plaintiff excepted to both these rulings. There was also an objection taken by the defendant to

the forthcoming bond, on the ground that after the words "shall have forthcoming and deliver," the term "aforesaid property" was omitted. The further facts appear from the opinion. Judgment for the defendant. The plaintiff removed the cause to this court by a writ of error.

Sheppard, for the plaintiff in error.

Thompson and James R. Enloe, contra.

By Court, CLAYTON, J. There are various reasons assigned for the reversal of the judgment in this cause: 1. That the certificate of the register of the land office at Columbus, was improperly rejected. 2. That the deed under which the purchasers claim, was also improperly rejected. The certificate of the land office is expressly made evidence by our statute, How. & Hutch. 599, and we can see no reason which justified its rejection. Indeed, we do not see that it was necessary on the part of the plaintiff in error, or of his lessor, to show the title of the defendants to the premises. They were defendants in the judgment under which the land was sold, and which was purchased by the plaintiff under the execution. He became the purchaser of all their title. They were afterwards merely tenants at will of the purchaser, and in an action brought by him were not at liberty to set up a right in any third person, or to deny that as to him they were the owners; *Jackson v. Graham*, 3 Cai. 188; *Jackson ex dem. Masten v. Bush*, 10 Johns. 224. In an action of ejectment by the mortgagor against the mortgagee, proof of the due execution of the mortgage deeds is the only evidence required: Ad. E. 308. So in an action by the purchaser under execution against the defendant in execution, no evidence of the title of the latter at the time of the sale is necessary. If he acquire an adverse title subsequently, that is matter of proof to be made out in the defense: *Henderson v. Overton*, 2 Yerg. 394 [24 Am. Dec. 492.] Neither do we see any sufficient reason for the rejection of the sheriff's deed. The fact that the purchaser was one of the defendants in the execution, can not vitiate the sale. If he bought and paid for the land, we know of no reason why he should not occupy the same position with any other purchaser.

It is objected, by the defendants in error, that this court can not reverse the judgment because of the fact that the judge who signed the bill of exceptions to the overruling of the motion for a new trial is not the same judge who presided at the trial. The case was tried in November, 1842, but the judge who then pre-

sided signed a bill of exceptions setting out all the evidence, but took the motion for a new trial under advisement. The motion was overruled, and a written certificate to that effect was transmitted to the clerk. At the next term, exception was taken to this order. A different judge was then presiding, and signed the bill of exceptions. He certified no new fact, but only stated that the motion for a new trial had been overruled. To prevent a failure of justice, this must be regarded in the same light as if it had been done by the judge who presided at the trial. Indeed, it is the action of the court which we revise, and the court is the same, although the judge may be different. It is also urged in behalf of the same party, that the judgment upon the forthcoming bond, under which the sale took place, is void, and that consequently no title passed to the purchaser. The objection to the validity of the bond is the same which was urged to the bond in the case of *John J. Clow et al. v. William A. Tharpe*, 8 Smed. & M. 64. We there held that the bond was not void, though not formal in its terms. We think that opinion was correct.

The judgment of the court below is reversed, and a new trial granted.

CERTIFICATE OF TITLE AS EVIDENCE.—A final certificate of title, under the act of congress settling Spanish claims, is sufficient evidence of title, and can not be questioned by a trespasser: *Richardson v. Hobart*, 18 Am. Dec. 70; and the certificate of the register and receiver is evidence of a claim: *Logan v. Moulder*, 33 Id. 338. See also *Guidry v. Woods*, 36 Id. 677.

SHERIFF'S DEED IS CONCLUSIVE EVIDENCE of the right of possession in the purchaser against the defendant in execution and all claiming under him after the judgment: *Hale v. Henrie*, 27 Am. Dec. 289. Though the recital in a sheriff's deed is not conclusive evidence of the fact stated, but may be contradicted by parol: *Leshey v. Gardner*, 38 Id. 764.

PLANTERS' BANK v. CALVIT.

[8 SMEDES & MARSHALL, 143.]

JUDGMENT IS BUT A SECURITY FOR A DEBT, and the payment of the debt is the object of the lien.

LIEN OF JUDGMENT ARISES BY MERE IMPLICATION OF LAW; and although a new judgment be predicated on the first, this does not necessarily destroy the lien which the law has given, for it is competent for the law to keep the lien in existence.

DUTY OF THE APPELLATE COURT is to review the legality of the proceedings of the court below, and if the trial and proceedings have been according to legal principles, then the appellate court must affirm the judgment.

"SATISFACTION" OF JUDGMENT, WHAT IS. — "Satisfaction" is a technical term, and in its application to judgments it means the payment of the money due by the judgment, which payment must be entered of record. **JUDGMENT HAS ALL ITS VALIDITY PENDING ERROR.**

PLAINTIFF CAN HAVE TWO JUDGMENTS at the same time for the same cause of action; but he can not have two productive judgments, nor executions of both, and can have but one satisfaction.

AFFIRMANCE OF JUDGMENT ON APPEAL, EFFECT OF. — A judgment exists as a lien from its rendition. It derives no additional force from its affirmance on appeal, even where the appellate court enters a new judgment, but is not satisfied, merged, or extinguished by the second judgment, and it retains its lien.

BILL in chancery. The material facts alleged are that Calvit in 1834 obtained a judgment against one Goosey, from which Goosey appealed; that Goosey, having been heavily indebted to the complainant, executed in 1835 certain notes to him, with one Hoopes as indorser, and to secure Hoopes deeded him a certain tract of land. The notes not having been duly paid, the land was sold and bought in by the bank. The deed is dated August 14, 1840. In the mean time the bill alleges that Calvit had obtained a decree to sell the same property, prior in date to the deed, but an appeal had been taken, and the decree affirmed in 1839; and that Calvit was endeavoring to proceed against the property. The complainant contends that Calvit's original decree was merged in the decree of affirmance upon the appeal bond. An injunction was granted by a circuit judge staying the sale of the property levied on under the decree in Calvit's favor, which was dissolved by the chancellor on motion, for want of equity on the face of the bill. Plaintiffs appealed.

W. P. Miles and Robert Hughes, for the appellant.

G. Winchester and George S. Yerger, contra.

SHARKEY, C. J. The principal question in this case is, does the judgment of affirmance rendered by this court, on appeal, against the principal and his sureties in the appeal bond, extinguish the original judgment and destroy the lien created by it, and substitute only a new lien from the date of the judgment of affirmance? To support the affirmative of this proposition, the counsel for appellants rely mainly on the provisions of the twentieth section of the act relating to the high court of errors and appeals, How. & Hutch. Dig. 535, which provides that a certified copy of the bond on appeal, or writ of error, shall be transmitted to the court above, with the transcript of the record of the cause; "and in case the judgment or decree of the court below shall be affirmed, or the appellant or plaintiff in error

shall fail to prosecute the same to effect, the supreme court shall enter up judgment or decree against all the obligors in such bond, both principal and surety, for the debt, damages, and costs, which may be adjudged to the appellee or defendant in error; and it shall be the duty of the clerk of the court below, on the certificate of the clerk of the supreme court, to issue execution thereon accordingly." By the forty-third section of the law relating to trial and judgment, Id. 621, it is provided, that in all cases the property of the defendant shall be bound and liable to any judgment from the time it is rendered. This act, undoubtedly, had reference more particularly to judgments of the circuit courts. Its object was, to secure the plaintiff who might recover judgment in the circuit court by making his judgment a lien.

The first thing which strikes the mind in considering these acts is their respective dates. The first was passed in 1822, and the other in 1824. The judgment of the supreme court was not a lien at all until the act of 1824 made it so. We can not, therefore, control the latter act by the former, but the latter must have a controlling influence over the former. It can not be defeated by the operation of the first act, when, but for the second, it could not have had such operation at all. If, then, it was the intention of the legislature to give the plaintiff a lien from the time he recovered a judgment in the circuit court, that lien can not be defeated or qualified by a pre-existing law; and if such be the necessary effect, then, on legal principles, it would follow that the first should be considered as so far repealed by implication. But I shall endeavor to show that the judgment of the appellate court under the twentieth section, does not destroy the original lien of the first judgment. A judgment is but a security for a debt, and the payment of the debt is the object of the lien. By law the property of the defendant is bound and liable to satisfy the judgment; that is, there is a tie, or claim upon it, which remains until the judgment is satisfied. The lien arises by mere operation of law; it is not capable of being enforced as an independent lien, but it is merely passive, and when the execution is levied, it is not enforcing the lien, but the judgment, the effect of the law being that the property shall remain liable to the satisfaction of the debt. And even if there be a new judgment, this does not necessarily destroy the lien which the law has given, for it is competent for the law to keep the lien in existence, although a new judgment be predicated on the first. The object of the law is not accomplished until the debt is paid.

The commission of the appellate court, is to review the legality of the proceedings of the court below, and if the trial and proceedings have been according to legal principles, then the appellate court must affirm the judgment. The law has annexed certain incidents to this affirmation, but these do not essentially change the character of the judgment. Its legal effect is to declare that what has been done, was done rightly; to declare it to be a legal judgment. The damages and judgment on the bond are but incidents which the law requires the appellate court to attach to an already valid existing judgment. They are but cumulative to that which pre-existed. To me it seems a contradiction that the judgment of affirmance, the act which declares that the judgment was regular, and constituted a perfect lien from the time it was rendered in the circuit court, should be considered as the act which destroys the validity of the lien. Affirm means to ratify or confirm, and not to destroy. Still it is said this must be the effect, because the original judgment is satisfied, or merged, or extinguished by the new judgment. Now I maintain that the first judgment is neither satisfied, merged, nor extinguished by the new judgment or affirmance. Satisfaction is a technical term, and in its application to judgments, it means the payment of the money due by the judgment, which payment must be entered of record, and nothing but this is a legal satisfaction of a judgment: 2 Tidd, 981. It is true, that by payment *in pais* the defendant may lay the foundation on which the court will direct satisfaction to be entered, or a levy on sufficient property is held to be a satisfaction. So it was held in *Mumford v. Stocker*, 1 Cow. 178, that a judgment recovered on a judgment was no satisfaction or extinguishment of the first judgment, both debts being of equal degree, and the court accordingly refused to have satisfaction entered, holding also that no satisfaction could be entered until there was actual satisfaction. Now I presume that the interest on the first judgment was embraced in the second, and to this extent at least it was a new judgment.

Nor is the first judgment merged in the second, for both judgments are of equal dignity, and no merger can take place unless one right be inferior to the other: 4 Jac. L. Dict. 279. Nor is it extinguished, which, as a legal phrase, means the annihilation or extinction of a right, by its being consolidated with a greater or more extensive right. In its application to debts, an extinguishment takes place only when the original debt is destroyed, as if a *feme sole* marry her debtor, or if a debtor be

made executor at the common law, etc. So, taking a security of a higher nature, extinguishes the first security; but a security of an inferior or equal degree does not extinguish the first security: *Balston v. Baxter*, Cro. Eliz. 304; *Manhood v. Crick*, Id. 716; *Norwood v. Grype*, Id. 727; *Maynard v. Crick*, Cro. Car. 86; *Mumford v. Stocker*, 1 Cow. 178. Then if the first judgment is neither satisfied, merged, nor extinguished by the second, how can the lien be destroyed? These are all technical terms, but their meaning falls short of the object. If we get clear of the lien of the judgment, we must do so by legal means, and I find nothing which destroys the judgment. It may be suspended, but this will not destroy the lien; for instance, the plaintiff who gives a stay, suspends his judgment, but does not lose his lien. So is a judgment suspended by injunction, but the lien is not lost. Knowing there is no way by which to get rid of it, I conclude, that it is a judgment still, at least, for all the purposes of the lien.

I think the English practice accords with this view. When a case is taken by writ of error from an inferior court to the court of king's bench, and affirmed, that court gives a new judgment, which includes costs, and by 3 Hen. VII., c. 10, and 19 Hen. VII., c. 20, damages also, and the record being there, execution emanates from that court: 2 Tidd's Pr. 11, 26, 27, 28, etc. The only difference between the judgment of that court and this, is the rendering of judgment against the sureties in the writ of error bond, which in England is obtained by a different remedy; but including costs and damages, makes it as much a new judgment, as if it were rendered against the sureties. The judgment corresponds in form to our judgments. It recites, that the record being examined, and no error being found, it is considered that the judgment be affirmed, and that the defendant in error also recover his costs and damages, which are assessed by the court, and constitute part of the recovery. When the execution issues, it recites the first judgment, the removal of the record, and the affirmance, and commands the sheriff to make the aggregate sum, including the amount of costs and damages, and it issues to the county in which the venue was laid in the original suit: 2 Sellon's Pr. 220, 387, 419. Why does it recite the original judgment, if that judgment has lost its effect, and why issue to the county of venue?

In England, an action of debt may be brought on a judgment pending error, and a second judgment recovered, which the court will not set aside, but proceedings may be stayed until the

determination of the writ of error: *Farwell v. Stone*, 4 Burr. 24, 54; *Benwell v. Black*, 3 T. R. 643. The conclusion is, that if the first judgment should be affirmed, then the plaintiff may proceed on the second. How could this be if the judgment of affirmance destroyed the first judgment? By sweeping away the foundation, the superstructure would fall. The latter judgment would of course depend upon the first. Where there are dependent judgments, the reversal of the first destroys the second: 2 Tidd, 1128. Now I apprehend, that the same result would follow if the first judgment were annulled or destroyed by any other means. From these authorities it is plain, that a judgment has all its validity pending error; but on the supposition that the judgment of this court destroys the effect of the first judgment, this could not be the case here. The mere suing out of a writ of error would destroy the judgment, for the appellate court must either reverse or affirm, and in either case the result would be to destroy the lien the moment a writ of error and *supersedeas* should be taken. In that case the plaintiff below could not proceed on his judgment, and when he obtained a new judgment, that could only operate from the date of its rendition.

By the statute of Westminster 2, c. 18, the judgment binds half the freehold from the rendition, in case the plaintiff should sue out an *elegit*; and yet, by bringing an action of debt on the first judgment, it is no waiver of the lien: *Erby v. Erby*, 1 Salk. 80. A writ of error is like a new action, and according to this authority, it does not destroy the lien in England; yet, according to the argument of appellant's counsel, a writ of error would here destroy it. This is easily illustrated. A. has recovered judgment in the circuit court against B. B. sues out his writ of error with *supersedeas*, and then sells his property. It is plain he may do so, because if the appellate court affirm, the original lien is gone, and the new one is now defeated by a previous sale. Now, if a plaintiff in England does not destroy his lien by a new suit, for much stronger reasons, the defendant here should not be allowed to destroy it by a new suit, for in general no one can be deprived of his lien without his consent. The case cited above from 1 Salkeld, is a very strong authority. It was a contest between liens by mortgages and judgments. On one of the judgments no execution had been issued for a year and a day. It could not, therefore, be enforced by execution, but a new action was the only remedy. Still, although dormant, it was held to be a lien. The action on it must have resulted in a new judgment, and when the execution was sued

out, it could only be on the new judgment, and yet we see the lien of the original judgment was retained, although it could not be enforced, and indeed never could be enforced on that judgment. The objection was made, that the plaintiff could only extend the land, which the party had at the date of the latter judgment, but it was overruled. The case furnishes a complete answer to the argument, that the lien of the first judgment can not be enforced, and that there can not be a lien which can not be enforced. It shows that the lien begins with the first judgment, and continues, although there be a new judgment; that the entering of a new judgment does not destroy the binding power of the old one. It is no doubt true, that a lien without the means, either present or future, to enforce it, can not exist. But the writ of error merely suspends the remedy. On the principle assumed in argument, it is an easy matter to show that a defendant may prevent any judgment from operating as a lien. A defendant may either appeal or take a writ of error, and the judgment of the appellate court is the same. Now, suppose the moment a judgment is rendered, the defendant appeals, at what period of time could such a lien be enforced? At none. The appeal is granted the instant the judgment is rendered. There is no time for an execution, for that can not issue until after the adjournment of court. The security given on taking an appeal or writ of error, does not compensate the plaintiff for his lien. It is less certain, less effectual, and the law has nowhere directed that the lien shall be surrendered for this security. To give it this effect, by consequence drawn from the provisions of a former law, is to a certain extent to substitute a precarious security for that which the law designed as certain and safe.

The argument mainly relied on is the analogy which the judgment of affirmance bears to the statutory judgment which accrues on the forfeiture of a forthcoming bond, it being insisted that in the latter case, as the judgment is "satisfied," so it must be in the first. It is now well settled, that the forfeiture of a forthcoming bond has the effect of a judgment, and is a satisfaction of the original judgment. I shall not question these decisions. In the result they are no doubt correct, but it may be questionable whether the term "satisfaction" was properly applied in those cases. I have already shown what is meant in technical language by this term. One judgment neither satisfies, merges, nor extinguishes the judgment on which it is founded, according to the technical meaning of those terms.

But there is much greater reason for saying that the forfeiture of a forthcoming bond satisfies the original judgment, than there is for saying that by affirmance the first judgment is satisfied. A forthcoming bond is never taken without a levy, and a levy on sufficient property is a legal satisfaction. The levy remains until the forfeiture, which then takes the place, and is a substitute for the levy. Here the analogy fails. In the case before us the only satisfaction pretended, is the judgment of the appellate court, which judgment is not founded on any new consideration, as the judgment on the bond is, but it is a mere ratification of the first, a mere declaration that it was correct, a decree to carry it out with the legal incidents, as the chancellor would carry out the lien of a mortgage by a decree to sell the mortgaged premises.

It is also insisted, that the plaintiff can not have two judgments, and that consequently the last is the only one which is operative. This might all be true, and still it is competent for the law to preserve the lien of the first. It is true, that a plaintiff can not have two productive judgments for the same cause of action; and this, I apprehend, is all that was meant in the case of *Clark v. Anderson*, 2 How. 852, when the court said, "the law will not permit two judgments to exist at the same time against the same person for the same debt." It was evidently all that was meant in the case of *McNutt v. Wilcox & Fearn*, 8 Id. 419, when it was also said the plaintiff was not entitled to two subsisting judgments for the same cause of action. A plaintiff can not have execution of two judgments for the same cause, but that he can have two judgments of record which exist as judgments at the same time seems to me manifest, unless we can invent other means to get rid of one than satisfaction, merger, or extinguishment of the first judgment by the second, for neither of these takes place. It is common in England for the plaintiff to bring a new action on his judgment pending error, or at least there are several cases in which it was done; and in one case an application was made to stay the proceedings of the second suit before judgment, but they refused to do so. Execution will be stayed, but the party is at liberty to take his judgment. Now, in all such cases, there are two judgments, but the party can only have satisfaction of one.

We have been referred to the case of *Purdy v. Doyle*, 1 Paige, 558, to show that the lien of a judgment is lost by a second suit, and it is there so said; but I have already cited a case from 1 Salkeld, which is directly the other way, and which must be the

law, unless the first judgment can be annihilated or disposed of by the second, by making it of higher dignity. We have also been referred to a case in 3 Yerger, 297, *Young et al. v. Read*, to show that an injunction bond destroyed the lien, because on that bond judgment was to be rendered. It seems rather to have been the impression of the judge, that it should be so, but it was not decided as a point in the cause. It was a mere argument of the judge, and is not entitled to the weight of a decision. When an appeal is taken, a transcript goes to the appellate court; the original judgment remains in the court below, and there can be no difficulty in regarding it as the foundation of a lien. I therefore repeat, that the first judgment exists as a lien from its rendition, deriving additional force from its ratification in the appellate court as an operative binding lien, together with the accumulation of the legal incidents or consequences of judgment for damages against the principal and his sureties, which are annexed to the original lien as penalty for delaying its operation. That it is neither satisfied, merged, nor extinguished by the second judgment.

Another point was made in the cause, but not seriously relied on. The inclination of my mind is, that it is not tenable. I therefore think the decree of the chancellor should be affirmed.

TURNER, J. You can not enforce the lien of a mortgagee without the decree or judgment of a court of justice, and the decree or judgment does not extinguish the lien, but provides the means of enforcing it. A vendor's lien for purchase money can not be enforced, but by a judgment. The judgment does not extinguish the lien. And so of liens given in favor of creditors in preference to purchasers, by the registry acts of the state. It would seem to be unjust to deprive one of his lien, without his consent. Where a plaintiff having a judgment and a lien on defendant's property, by virtue of his judgment sues out a *fi. fa.*, and procures a levy on defendant's property, it is the plaintiff's own act; such levy is considered a satisfaction until exhausted, and a deficit is shown: the forthcoming bond is a statutory security, provided by the statute law; and the only reason why such a bond, when forfeited, has been construed to satisfy or remove the lien of the first judgment, is because of the levy of the plaintiff's execution on defendant's goods. In case of appeals and writs of error, the reason fails; and courts of justice are ever inclined to favor and to sustain liens in favor of creditors. I have heretofore been inclined to a different opinion; but having investigated the subject with more care, I have come

to the conclusion that the law is as stated in the opinion of the presiding judge, and concur in that opinion.

CLAYTON, J., dissented.

On rehearing:

By Court, TEACHER, J. This case has received an unusually careful examination by counsel, and profound reflection from the court. With the advantages of access to the former laborious and learned investigations of my predecessor and associates, the difficulties in forming my opinion have been to a great extent removed. The constitution declares, that the high court of errors and appeals shall have no jurisdiction but such as properly belongs to a court of errors and appeals. To a general, although not to a universal extent, it is therefore a revisionary tribunal only. Its judgment of affirmance is then no more than a ratification of what has already been correctly done. It is of no higher dignity than the judgment it affirms, because it is merely confirmatory of it; and it is no satisfaction nor extinguishment of it, because it is no payment, and adds to it no greater or more enlarged rights. Whatever rights, therefore, are acquired from the judgment below, are not altered by its affirmance. The lien which by law a judgment gives is a vested legal right, which was perfect at the date of the judgment below. It can be lost only by the act or consent of its beneficiary. The affirmance is but a repetition of judgment, and the damages thereon constitute but a penalty for the vexation of delay. They are incidents to the appeal, but not parts of the original judgment.

The above positions are elaborately argued and explained in the opinion of the chief justice in this case, and I therefore refrain from their further discussion as unnecessary for conviction. They are to their whole extent, and in their conclusions, adopted by me.

JUDGMENT LIEN, WHEN ATTACHES: See *Jones v. Jones*, 18 Am. Dec. 327; *Hanson v. Barnes' Lessee*, 22 Id. 322; *Coombs v. Jordan*, Id. 236; *Andrew v. Doe*, 38 Id. 450; *Campbell v. Spence*, 39 Id. 301.

SATISFACTION OF JUDGMENT, WHAT AMOUNTS TO: See *Beebe v. Bank of New York*, 3 Am. Dec. 353; *Donovan v. Finn*, 14 Id. 531; *Hunt v. Breeding*, Id. 665; *Bank of Pennsylvania v. Winger*, 18 Id. 633; *Coombs v. Jordan*, 22 Id. 236; *Whitehill v. Wilson*, 24 Id. 326; *Sherwood v. Collier*, Id. 264; *Stoney v. Shultz*, 27 Id. 429.

WRIT OF ERROR SUSPENDS LIEN, but does not destroy it: *Commercial Bank v. Western Reserve Bank*, 38 Am. Dec. 739; though in *Campbell v. Spence*, 39 Id. 301, it was held that the lien of a judgment is discharged by suing out a writ of error and *supersedes*.

YARBOROUGH v. THOMPSON.

[3 SNEDES AND MARSHALL, 291.]

BILL OF INTERPLEADER IS A PROPER REMEDY when suits are either threatened, or actually pending by two different claimants against a party, claiming the same debt or duty by different or separate interests.

BILL OF INTERPLEADER SHOULD BE FILED BEFORE JUDGMENT, for after the determination of the right by a judgment at law equity can not interfere.

INTERPLEADER WILL NOT LIE WHEN COMPLAINANT DEFENDS against both suits; hence, where he defended both against an attaching creditor and an assignee of a note, and is unsuccessful in both suits, the bill will not lie.

EQUITY HAS NO POWER TO CORRECT ERRORS IN JUDGMENT of a court of law; that belongs to the appellate tribunal.

EQUITY CAN NOT COMPEL PARTY TO RELINQUISH JUDGMENT AT LAW, because his adversary did not comprehend his rights, or was mistaken in a matter of law.

APPEAL from the circuit court of Choctaw county. The opinion states the case.

Gray, for the appellant.

William G. Thompson, contra.

By Court, CLAYTON, J. The single point presented in the argument of this cause, is, whether the bill discloses a case in which a bill of interpleader can be sustained. The complainant Thompson was indebted to one James Holbert by promissory note, who assigned it to Yarborough, the present appellant. Holbert was indebted to Loftus & Smith, who issued a garnishment against Thompson. At the time of the service of the garnishment, Thompson had no notice of the assignment, but received notice before he filed his answer. Under the advice of counsel, as the bill alleges, the complainant filed such an answer to the garnishment, that judgment was rendered against him upon it for the amount of the note. Suit was subsequently brought by Yarborough, the assignee upon the note, who likewise recovered judgment upon it. The complainant then filed this bill of interpleader against the judgment creditors respectively; requiring them to interplead, and praying that one or the other might be perpetually enjoined.

A bill of interpleader is a proper remedy when suits are either threatened, or actually pending by two different claimants against a party claiming the same debt or duty by different or separate interests. The complainant not knowing to which of right he ought to pay or render it, files a bill and requires them to interplead, that the court may determine the right: Cooper's Eq.

Pl. 46; 2 Story's Eq. 112 *et seq.* The principle of a bill of interpleader is to protect the party, not only from being compelled to pay, but also from the vexation attending the discussion of all the suits that may be instituted: *Angell v. Hadden*, 15 Ves. 246. It is not necessary in order to justify the filing of such a bill, that suit should actually have been commenced; it is sufficient that claim should have been made against the party, and that he is in danger of being molested by conflicting rights: 2 Story's Eq. 116. But after judgment at law, and after the right is thus determined, a court of equity can not interfere upon the footing of a bill of interpleader. The complainant might have made his defense at law, or at all events, should have filed his bill before judgment; because of the familiar rule, that a court of equity can not give relief when the party might have made defense at law.

There is no evidence that anything unconscientious was done by either of the defendants in this case, in obtaining their judgments. Each proceeded upon a legal claim. The complainant defended each, but from some cause was unsuccessful in both. One of the judgments is no doubt wrong; but, from the bill, the error was induced by the complainant's answer to the garnishment. A court of equity has no power to correct the errors in judgment of a court of law; that belongs to the appellate tribunal. Neither can it compel one party to relinquish a judgment at law, because his adversary did not comprehend his rights, or was mistaken in a matter of law. The case is a hard one, but the complainant has no right to complain of either of the defendants, or of the court. The judgments of the courts of law, upon the facts before them, were right in each instance. If a case of fraud or surprise in obtaining either of the judgments were made out against either of the parties, that might entitle the complainant to relief against such party; but that would be done upon an original bill, not a bill of interpleader: 2 Rob. Pr. 214.

This conclusion is reached in full view of what is said by the court, in *Oldham v. Ledbetter*, 1 How 47 [26 Am. Dec. 690]. The remark in that case, that the plaintiff could have protected himself by bill of interpleader, was thrown out without sufficient consideration. It was not a point for decision. The cases there cited only prove, that a judgment against a garnishee upon an attachment, after an assignment of his note, will not form a bar in his favor, in an action by the assignee. If, in such case, the garnishee answer with the requisite caution, he will run no risk.

If he state the fact, that he executed a note to the debtor of the attaching creditor, but he does not know who holds it, or whether it be assigned or not—still more, if he state that it has been assigned, and that he has received notice of it, no judgment upon the attachment can be rendered against him: See *Huff v. Mills*, 7 Yerg. 45. Of course, he must answer according to the fact. But if he neglect so obvious a precaution, he is but in the situation of every other defendant, who neglects his proper defense at law, at the time he has the means of making it.

The decree of the court below will be reversed, and the bill dismissed.

INTERPLEADER.—This subject is discussed at length in the note to *Shaw v. Coster*, 35 Am. Dec. 690. The principal case is cited with approval on the point as to the liability of a garnishee defending both suits, and failing to interplead: *Hardy v. Hunt*, 11 Cal. 350; *Cheever v. Hodgson*, 9 Mo. App. 567.

JUDGMENT AT LAW—RELIEF AGAINST IN EQUITY: See *Hunt v. Boyier*, 19 Am. Dec. 116; *Haughly v. Strang*, 27 Id. 648; *Turner v. Davis*, 30 Id. 502; *Pendleton v. Galloway*, 34 Id. 434; *Emerson v. Udall*, 37 Id. 604; and the note to *Oliver v. Pray*, 19 Id. 595, where this subject is discussed.

TOOLEY v. GRIDLEY.

[3 SHERDES AND MANNALL, 493.]

CIRCUIT COURT HAS JURISDICTION OF SUIT FOR FORECLOSURE of mortgage. CONFIRMATION OF REPORT OF SHERIFF'S SALE IS USUALLY NECESSARY to its validity.

CIRCUIT COURT HAS JURISDICTION TO WATCH over execution of its decrees, and to regulate all proceedings under them, until the case is finally disposed of.

CONFIRMATION OF SHERIFF'S SALE BY PARTIES THEMSELVES, by their own acts, is as valid as if by the court.

SHERIFF'S SALE IS SUFFICIENTLY CONFIRMED BY COMPLAINANT when he makes no objection to the sale for any reason, but accepts the purchaser's bond, and issues executions upon it after it ripened into judgment.

CHANCERY COURT HAS NO POWER TO REVISE and correct the decisions of the circuit court on its chancery side, under the constitution.

EQUITY HAS NO JURISDICTION TO SET ASIDE PROCEEDINGS in another court, which have transpired in a matter falling under its legitimate cognizance.

IRREGULARITY IN CARRYING DECREE OF CIRCUIT COURT INTO EFFECT confers no authority on a court of chancery to interfere, as it is competent for the circuit court to pass upon and correct that matter.

OBJECTION TO SHERIFF'S SALE, BECAUSE ON CREDIT, CAN NOT BE MADE, after the party objecting has confirmed it by his own acts.

APPEAL from the decision of the superior court of chancery. The facts are stated in the opinion.

G. Winchester, for the complainant.

Montgomery and Boyd, contra.

By Court, CLAYTON, J. This was a bill filed in the superior court of chancery by the appellant, stating that he had in the year 1835 sold a certain house and lot in the city of Natchez, to the defendant Gridley, for the sum of seven thousand five hundred dollars, and had taken a mortgage upon the premises to secure the payment of the purchase money. After the money became due, and there had been a failure of payment, he filed a bill of foreclosure in the circuit court of Adams county, and obtained a decree for the purpose, at its October term, 1838. By the decree, M. Izod, the sheriff of Adams county, was appointed to make the sale; he proceeded to do so, sold the premises to James R. Kane in January, 1839, and took his bond payable in six months, in pursuance of the decree, with Francis Little and Thomas Mackin as his sureties, for the sum of three thousand seven hundred dollars. This bond he returned to the court, and executed a deed to the purchaser for the lot, though the sale, according to the statement of the bill, was never confirmed. This bond was not paid, and after its maturity, execution issued upon it, which was levied, among other things, upon the same lot for which the mortgage was given. There were other executions also in the hands of the sheriff at the same time, founded on judgments of older date than that of Tooley. The money arising from the sale was brought into court, and a motion made by Tooley to have it appropriated to his execution. This motion was overruled, and the money applied to the executions issued upon older judgments. Another execution issued, which was levied on property of Little and Mackin, but after the sale, and at the return term thereof, it was quashed upon motion. A part of the property sold was purchased by Tooley, and the residue by other persons, who failed to comply with the conditions of the sale. When the lot originally mortgaged was sold under the execution against Kane, it was purchased by one McMasters, and by him conveyed to Lacoste. The bill alleges, that the purchase of McMasters was colorable and fraudulent, that he made no payment for it unless with the money of Kane, and that Lacoste purchased it of McMasters with a full knowledge that the money due to Tooley was unpaid, and that McMasters had paid nothing for it, unless with the money of Kane.

It also charges, that Lacoste paid nothing for it, and that he holds it as trustee for Kane. That Izod never received the con-

sideration from McMasters, nor did he advertise the sale according to law. The bill offers to surrender complainant's deed to Mackin's property, if the court will set aside the sale to Kane. Prays that Kane, McMasters, and Lacoste, may be compelled to deliver up their deeds to be canceled; that the sale to Kane be set aside, and a resale directed; that all the proceedings under the decree be set aside, and the decree regularly and duly enforced; and, if necessary, that a *certiorari* be awarded to remove all the proceedings from the circuit into the superior court of chancery. To this bill the defendants filed a demurrer, and assigned as causes: 1. That improper parties were joined. 2. That the matter grew out of a proceeding in the circuit court on its chancery side, and is part of a suit still pending there. 3. That the irregularity in the execution of the decree may be corrected in the circuit court. The chancellor sustained the demurrer, and dismissed the bill for the want of jurisdiction; from which order this appeal is taken.

At the commencement of the suit for the foreclosure of the mortgage, it was open to the complainant to have sought his remedy in either the circuit court or the court of chancery. He selected the former. He now seeks the aid of the latter, because of error or irregularity in the proceedings of the former, which has caused injury to him. The first error complained of, is, that the sheriff, who executed the order of sale, did not make advertisement, nor did he make report of the sale to the next term of the court. It does not very clearly appear from the bill, what is the present situation of the suit in the circuit court. If it is still pending, and there has been no confirmation of the sale, nor anything equivalent to it, then the sale of the sheriff under the decree is incomplete, and may be set aside in that court. Confirmation of a report of sale is usually necessary to its validity: *Ex parte Minor*, 11 Ves. 559. The circuit court having jurisdiction to decree the foreclosure of mortgages, must have power to watch over the execution of its decrees, and to regulate all proceedings under them, until the case is finally disposed of. The chancellor was of opinion that the cause was still pending, in such a state that the circuit court had power to afford relief by setting aside the sale. See *Tooley v. Kane*, 1 Smed. & M. Ch. 518.

But if, as we are inclined to believe, the acts of the parties in this case amounted to a confirmation of the sale, and vested the title in Kane, the purchaser, still the complainant has no right to the relief sought in this bill. The decree itself is peculiar and informal. It directs the sheriff "to sell the premises on

a credit of six months, the purchaser thereof to give bond and sufficient sureties for the payment thereof, to execute a deed for the same to the purchaser, to bring the moneys arising on said sale into court, and to make report of his proceedings thereon, with all convenient speed, and to pay over the amount due him to the complainant." What is usually embraced in the interlocutory and final decrees together, is all here blended into one. The commissioner is directed to execute a deed, and to collect and pay over the money in the first instance, instead of retaining this part of the decree, as the subject of the final order. If the complainant had objected to the form of this decree, for that cause, it would no doubt have been modified to suit his views, and put in the usual shape. If he had objected to the sale for want of notice, or for want of a good bond and sureties, the court would, no doubt, have set it aside, upon the requisite proof. Now if the money had been collected and paid over, no one would contend that any further confirmation was necessary to pass the title; and yet the complainant has given his assent to the sale as fully by accepting the bond, and by issuing executions upon it after it ripened into judgment. A confirmation by the parties themselves, by their own acts, is as valid as if by the court. To this extent the acts of the complainant have gone in this case. The terms of the decree were not objected to by him, the credit of six months was suffered to expire; then he caused execution to issue upon the bond given upon the purchase, and which had the effect of a judgment. After a sale had taken place under this execution and the money had been applied by the court upon his own motion, he acquiesced in the judgment of the court, and made no effort by appeal or writ of error to get it reviewed or reversed. When another execution issued, and a sale was made under it, he became the purchaser of property, and accepted a deed for it; and when the execution was quashed, he again acquiesced in the judgment. All these acts of confirmation surely bind him, and render the sale valid. This bill was filed in another court, to get all these proceedings set aside, and to reinstate the complainant to the position which he occupied when the first decree was pronounced. The chancellor was right in declining the exercise of any such jurisdiction. The constitution has given no power to the chancery court to revise and correct the decisions of the circuit court on its chancery side. Nor is it perceived, under what head of its original jurisdiction it can claim or exercise the power to set aside the whole or any part of the proceedings in another court, which

have transpired in a matter falling under its legitimate cognizance. Irregularity in carrying the decree into effect confers no such authority. It was competent to the circuit court to pass upon and correct that matter; and it is not for a court of concurrent jurisdiction to interfere.

It is urged in argument, that the decree for a sale upon a credit was erroneous, because it impaired the obligation of the complainant's contract, who had a right to have a sale for cash, and thus violated the constitution. The mortgage was executed in 1835, and the law then in force in regard to sales upon credit, applied only to sales under decrees of the superior court of chancery: How. & Hutch. 512. The statute authorizing sales upon credit under decrees of foreclosure in the circuit court, and under which this sale appears to have been made, was not passed until 1838. If this objection had been urged at a proper time, it would have been entitled to much consideration. See *Bronson v. Kinsie*, 1 How. (U. S.) 311; *Bumgardner v. Circuit Court of Howard County*, 4 Mo. 50; 1 Kent's Com. 418. The time, however, to urge it, was when the decree was made; it was not the only time, but it was the most appropriate. If it had been urged and disregarded, he might have had it settled by the appellate tribunal. He did not do this; he not only submitted to the terms of the decree without any expression of dissatisfaction, but he tacitly adopted and ratified the sale, by issuing two executions upon the bond given by the purchaser, and by claiming the proceeds of those executions. Unless the sale was incapable of ratification by subsequent confirmation, it would be a great stretch of power to attempt to annul it. So far as the sale to Kane is in controversy, the action of the circuit court, we think, is conclusive, because the complainant has confirmed it by his own act; and it is equally so, in regard to the appropriation of the money produced by the sale under execution, because no appeal or writ of error was taken from the decision.

The bill embraces too many objects and parties. It mingles matters over which the court clearly has no jurisdiction, with some of which, if standing alone, it might take cognizance. Thus, if the lot really belongs to Kane, and McMasters and Lacoste are in effect but trustees for him, the complainant, upon a bill filed for the purpose, after a return of *nulla bona* upon his execution, might subject it to his debt. It may be worthy of inquiry, too, whether in a sale under a decree of foreclosure, upon a credit, a lien similar to a vendor's lien is not retained by the court as ultimate security, or whether it requires an express

reservation in the decree to produce that effect. See *Iglehart v. Armiger*, 1 Bland, 519. We throw out the suggestion without having formed any definite opinion. If the lien exist, the mortgagor need not be a party in the bill filed to carry it into effect. The matters settled by the first decree, and the regularity and propriety of the proceedings under it, could not again be brought into litigation in the superior court of chancery, because beyond its jurisdiction. It would be an original proceeding, not calling into question the proceedings of the circuit court, but endeavoring to enforce rights growing out of such decree. These remarks are made only to point out the limits of our opinion, so as not to mislead the party, or preclude him from any remedy or relief to which he may be entitled.

The decree of the court below will be affirmed, and the bill dismissed without prejudice.

CONFIRMATION OF JUDICIAL SALES.—Confirmation of a sale of land upon a surrogate's order is necessary before conveyance, or the title will not pass, even though the sale be fair and for full value: *Rea v. McEachron*, 28 Am. Dec. 471. And confirmation by the orphans' court of a sale of land by an administrator, made subsequent to the term to which the order directing the sale was made returnable, is tantamount to the continuance of such order to the time that the sale was actually made; and such sale can not be collaterally attacked as void: *Klingensmith v. Bean*, 27 Id. 328. An order ratifying a sale under a decree or order is equivalent to a decree for the payment of the money, where no security is given: *Richardson v. Jones*, 22 Id. 293. Ratification of a sale which, in law, is an absolute nullity, creates a new title, and can not have a retroactive effect to the prejudice of rights that third persons have previously acquired: *Scott v. Gorton*, 33 Id. 578. In *Smith v. Wert*, 64 Ala. 38, the language of the principal case on the point as to the confirmation of a sheriff's sale was quoted with approval.

HARRISON v. MAYOR OF VICKSBURG.

[3 SUMMER AND MARSHALL, 581.]

STATE HAS AN UNDOUBTED POWER TO TAX PERSONS and property within its limits, and it may delegate such power to a civil corporation, so far as it may be necessary for the good government of the corporation.

GRANT OF THING INCLUDES MEANS NECESSARY TO ACCOMPLISH THE END. Hence, where the legislature gives a municipal corporation power to levy an *ad valorem* tax, it is competent for the corporate authorities to provide a penalty for a violation of the ordinance imposing the tax.

LAW IS NOT IN RESTRAINT OF TRADE which merely imposes taxes on the sales of merchandise.

ORDINANCE IS NOT IN VIOLATION OF THE CONSTITUTION that levies an *ad valorem* tax on all flatboats wherein goods may be sold on retail, though the flatboat may have brought goods from another state. Such a tax is

not an "impost or duty" within the meaning of the constitution of the United States; and it is probable that the prohibition in the tenth section of the first article applies only to foreign imports.

CITIZENS OF SISTER STATES ARE NOT EXEMPTED from the operation of our laws, when they come here.

PETITION for a writ of prohibition by Harrison, setting out that Harrison, a citizen of Ohio, being the owner of a flatboat, loaded with provisions, landed at Vicksburg and proceeded to dispose of his cargo, without paying any tax, or impost; that under an ordinance of the city requiring "an *ad valorem* tax to be levied on flatboats * * * wherein goods, wares, or merchandise are, or may be, sold by retail," a warrant issued from the mayor's court, and fifty dollars was recovered from him for a violation of the ordinance. The points contended for by the petitioner are stated in the opinion. The court overruled the motion for the writ, and the petitioner brought a writ of error.

A. R. Depew and H. S. Foote, for the plaintiff in error.

W. G. Thompson, contra.

By Court, **SHARKEY, C. J.** The mayor and council of Vicksburg passed an ordinance authorizing the levy of an *ad valorem* tax on the sales of produce by flatboat traders, within the limits of the city, and the mayor rendered judgment of fifty dollars against the plaintiff in error, for a violation of the ordinance. He applied to the circuit court for a prohibition, which was refused, and he brought his writ of error. The plaintiff in error resists the authority of the corporation: 1. For want of authority under the charter to pass such an ordinance; 2. Because the ordinance is inconsistent with the general laws of the state; 3. Because it is in restraint of trade, and in violation of common right; and, 4. Because the ordinance is in violation of the constitution of the United States, because it authorizes the levy of a duty or tax on produce imported by a citizen of one state into another state.

The authority to pass such an ordinance is expressly given by the amendment to the charter, passed on the twenty-second of February, 1840. The fourth section declares, that the twenty-seventh section of the charter of 1839 shall be so amended as to authorize the mayor and council to levy an *ad valorem* tax upon flatboats, barges, and other water craft, wherein goods and merchandise are sold at retail. The state has an undoubted power to tax persons and property within its limits; and it may delegate such power to a civil corporation, so far as it may be

necessary for the good government of the corporation: *Goddard v. Crump*, 7 Leigh, 120. The second objection is also untenable. We know of no law of the state which is contravened by the ordinance. On the contrary, it seems to be in strict accordance with the provisions of the charter. The legislature in giving the power to levy an *ad valorem* tax, gave necessarily the means necessary to accomplish the end. Hence it was competent for the corporate authorities to provide a penalty for a violation of the ordinance imposing the tax. The power to levy a tax would have been useless, without the power of coercing payment. In the next place, it is said to be an ordinance in restraint of trade, and therefore void. Laws which merely impose a tax on the sales of merchandise, are not in restraint of trade. The taxing power is one which is essential to the existence of the government, and the authority of a state to exercise it can not be questioned, as regards all property within its jurisdiction, which was brought there to be used or disposed of, and we have already said that the state may confer this power on a civil corporation.

Lastly, is the ordinance in violation of the constitution of the United States, because it authorizes the levy of a tax on produce imported by a citizen of another state? This tax is not "an impost or duty" within the meaning of the constitution of the United States. It is probable that the prohibition in the tenth section of the first article of the constitution has reference only to imports from a foreign country into the ports of the United States; and even in reference to these Chief Justice Marshall remarked, that when the importer has so acted with the thing imported, that it has become mixed up and incorporated with the mass of property in the country, it has, perhaps, lost its distinctive character, as an import, and has become subject to the taxing power of the state: *Brown v. State of Maryland*, 12 Wheat. 419. This ordinance imposed no tax for the privilege of introducing the article, but a tax on the amount of sales. The power of a state to tax the merchandise of its own citizens, has never been questioned, nor can it be. When a citizen of Ohio comes into this state, and makes sales of his merchandise here, there can be no reason why he should be exempted from the operation of state laws. This position, carried to its utmost extent, would defeat the power of the state over all sales of merchandise within its territory; it would only be necessary for the merchant to claim a residence in some other state, and the power of the state would be at an end.

Judgment affirmed.

STATUTE IS NOT IN RESTRAINT OF TRADE that provides for the survey of lumber in a particular county, in a certain manner, by surveyors appointed in a prescribed way, and prohibiting under penalty the sale or purchase of lumber in that county not so surveyed, or the survey of it by persons not so appointed: *Pierce v. Kimball*, 23 Am. Dec. 537; nor are city by-laws prohibiting a person without a license from carrying offal and house dirt through any of the streets: *Vandine, Petitioner*, 17 Id. 351; nor if it but relate to the regulation of the trade, and the regulation is for the good of the inhabitants, or for the advantage of the trade and the improvement of the commodity sold: *Mayor etc. of Mobile v. Yuille*, 36 Id. 441.

CONSTITUTIONAL PROVISION PROHIBITING TAX ON IMPORTS by a state is not violated by a city ordinance, authorising an inspector to measure coal sold within the city, and allowing him a fee therefor: *City Council v. Rogers*, 18 Am. Dec. 751.

BY-LAWS OF A CITY ARE BINDING ON STRANGERS coming within the territorial limits of the city: *Vandine, Petitioner*, 17 Am. Dec. 351.

POWER TO PASS A BY-LAW CARRIES AS AN INCIDENT the power to enforce its observance by some reasonable penalty: *Mayor etc. of Mobile v. Yuille*, 36 Am. Dec. 441.

WILLIAMSON v. WILLIAMSON.

[3 SWEDEN AND MARSHALL, 715.]

STATUTE SHOULD NOT BE DECLARED UNCONSTITUTIONAL but in cases of plain and manifest violation of that instrument by the legislature.

PRIVATE ACT EMPOWERING ADMINISTRATOR TO SELL DECEDENT'S LAND is not unconstitutional.

ACT OBTAINED BY FRAUD MAY BE ANNULLED by a decree of the chancery court; but to authorize it, the case must be clearly made out.

PROVISIONS OF PRIVATE ACT EMPOWERING ADMINISTRATOR TO SELL the decedent's land are as imperative and require as entire obedience as those of the general law in ordinary cases.

WHERE ADMINISTRATOR HAS FAILED TO GIVE BOND, with the conditions prescribed by the terms of the act empowering him to sell, the sale is void.

PERSONS PURCHASING AT VOID ADMINISTRATOR'S SALE will be declared trustees for the parties injured.

PURCHASER FROM ONE WHO HAS NO TITLE does not acquire any title, though he acted in good faith, paid a valuable consideration, and had no notice. Thus a *bona fide* purchaser at an executor's sale, when the latter had no power to sell, acquires no title.

ACCOUNT SHOULD BE DIRECTED, in a suit to set aside an administrator's sale, by an heir at law, against the administrator and those claiming under the sale; and if the sale is set aside, the purchasers should be charged with a reasonable rent and interest, and will be credited with the value of permanent and valuable improvements, provided they do not exceed the aggregate value of the rents.

APPEAL from the superior court of chancery. The facts are sufficiently stated in the opinion of the court.

George S. Yerger, for the appellants.

Robert Hughes, contra.

By Court, CLAYTON, J. In the year 1821, the legislature of this state passed an act to authorize Belfield Wrenn, as the administrator of John Cook, deceased, to sell and convey the certificates for three tracts of land in Warren county. The act is in substance as follows: "Whereas, it has been represented to this general assembly by Margaret Cook, widow of John Cook, deceased, and Belfield Wrenn, administrator of his estate, that the said John Cook in his life-time made entries of three several tracts of land in Warren county; and whereas, it has also been represented that the personal estate of said decedent is insufficient to pay the debts due from said estate, and the installments still remaining unpaid for said land, one fourth part only having been paid, without serious inconvenience to the widow and orphan of said deceased: Therefore, be it enacted, that the said Belfield Wrenn, upon entering into bond with sufficient security, to be approved by the orphans' court or chief justice thereof of said county of Warren, payable to the said chief justice, and his successors in office, in such sum as the said court or chief justice deem sufficient, that he observe the rules and directions of law for the sale of real estate by administrators, and that he will well and truly account for the proceeds of said sale, and that said proceeds shall be vested in such other property as the said administrator shall deem most for the interest of said widow and orphan jointly—be, and he is hereby authorized to sell the right which is in said John Cook, deceased, to said tracts of land, at such time and on such conditions as he may think would best promote the interest of said widow and orphan, and to make transfer of the certificates of said tracts of land to the purchaser, as effectually as the said John Cook, in his life-time, could have done."

In 1838 the present bill was filed by the only child and heir at law of said Cook, jointly with her husband, to set aside the sale which was made by the administrator under this act of assembly. The chancellor, by his decree, declared the sale to be null and void, and directed the same to be set aside; but refused to decree an account between the parties. From this decree, both parties appealed to this court.

The first point made in the argument is, that the act of assembly above recited, and under which the sale took place, is unconstitutional and void. It is insisted, that it partakes rather of a judicial, than a legislative character, that it is partial in its

operation, that it is not a general law of the land, and that in these particulars it violates the constitution. Acts of legislation of similar character have undergone judicial investigation in several of the highest courts of the Union; in some they have been sustained, in others they have been declared void: *Jones' Heirs v. Perry*, 10 Yerg. 59 [30 Am. Dec. 430]; 4 N. H. 565; *Hoke v. Henderson*, 4 Dev. L. 1 [25 Am. Dec. 677]; *Starr v. Pease*, 8 Conn. 541; *Williams v. Norris*, 12 Wheat. 129; *Wilkinson v. Leland*, 2 Pet. 627; *Rice v. Parkman*, 16 Mass. 326; 10 Am. Jur. 297; *Watkins v. Holman*, 16 Pet. 26.

This conflict in the decisions of courts of the highest respectability, has induced us to bestow upon this cause much deliberation, and to hold it under consideration an unusual length of time. The point is not free from difficulty and embarrassment, yet we can not see that the exercise of the power in question by the legislature is in such direct conflict with the constitution as to require us to declare the act void. This highest authority of the judiciary should never be exerted, but in cases of plain and manifest violation of that instrument by the legislature. The legislature might have enacted a general law, authorizing every administrator to do that which by this act this administrator was empowered to do. No constitutional objection would exist to such a law. Indeed, one with provisions in substance nearly identical has been passed, and no constitutional objections have been urged against it: How. & Hutch. 418. In *Williams v. Norris*, 12 Wheat. 129, the court says: "If the legislature may dispense with a matter in a general law, why may it not be dispensed with in a particular law, when its effect on the case is precisely the same as if it had been general? There are, undoubtedly, great and solid objections to legislation for particular cases, but these objections do not necessarily make such legislation repugnant to the constitution."

In the case cited from 16 Pet. 26, which arose under an act of the legislature of Alabama, the act was sustained. The constitution of that state is, in this respect, word for word the same with ours. It is true, the act in that case was passed for the purpose of creating a fund to pay debts. But the court says: "As it regards the question of power in the legislature no objection is perceived to their subjecting the lands of the deceased to the payment of his debts, to the exclusion of his personal property. The legislature regulates descents, and the conveyances of real estate. To define the rights of debtor and creditor is their common duty. The whole range of remedies lies

within their power. They may authorize the guardian to convey the lands of the infant; and, indeed, they may give the capacity to the infant himself to convey them." Again they say: "This is a question of power and not of policy; and on such a question we can not test the act by any considerations of expediency. Whether the act may be open to abuse, whether it be politic or impolitic, is not a matter now before us; but whether the legislature had power to pass it:" *Watkins v. Holman*, 16 Pet. 62, 63. The principles here laid down extend to other cases than the payment of debts, and warrant the exercise of the power in other instances. We feel safe in following this high authority in sustaining the legislative act, especially when to do otherwise would be to annul a law, because of a very doubtful conflict with the constitution, to speak of it in the strongest allowable terms.

It is next insisted, that this being a private act of legislation, operates only on those who petitioned for it, and those who claim under them: *Campbell's Case*, 2 Bland's Ch. 209; 2 Bl. 279. This view of the matter, which assimilates the act to a private conveyance, struck us at first with much force. But the case of *Watkins v. Holman*, 16 Pet. 26, is equally conclusive upon this point, as upon the other just noticed, and holds that titles under such acts, where the proceedings are regular, are valid. It is next objected, that this act was procured by fraudulent representations to the legislature. There is no doubt but that an act obtained by fraud may be annulled by a decree of the chancery court. The case, however, to authorize it, must be clearly made out. In this instance, the representation was, that the personal estate was insufficient to pay the debts due and the installments remaining unpaid for the land, without serious inconvenience to the widow and orphan of the deceased. The only proof of the fraud consists of the settlement made by the administrator, evincing, according to the argument, that no necessity for the sale of the land existed. The whole amount of sales of the personal estate was two thousand nine hundred dollars, seventeen hundred dollars of which was the price of the only negro belonging to the estate, who was purchased by the widow. To this may be added eight hundred dollars of debts due the estate. The amount of debts due from the estate, inclusive of what was due for the land, was two thousand four hundred dollars. It hence appears, that the whole of the personalty, exclusive of the slave, was insufficient to pay the debts. It would probably have been a great inconvenience to the family

to be deprived of the services of the only slave; and we conclude, that the representation made to the legislature was entirely consistent with truth.

We come next to the objection, that the terms prescribed by the statute itself, in regard to the sale, were not complied with. This was the ground upon which the chancellor decreed the sale to be void. Questions of analogous character are not of unfrequent occurrence, and the principles which govern them are now well ascertained. In *Cable v. Martin & Bell*, 1 How. 561, the court says: "The conduct of an administrator must be regulated by the limitations and restrictions imposed by law. His acts are only legal so far as they are justified by law. The ultimate right of property is in the distributees, and there is no way of divesting them of that right, except for such purposes and in such manner as the law prescribes. The right must remain unimpaired, unless taken away by strict compliance with law." This is the settled and recognized doctrine: *Ventress v. Smith*, 10 Pet. 161; *Wiley & Gayle v. White*, 2 Stew. 331.

The private act in this case comes in place or in aid of the general law, and its provisions are as imperative, and require as entire obedience as those of the general law in ordinary cases. It enacts, that the administrator "upon giving bond and surety that he observe the rules and directions of law for the sale of real estate by administrators, and that he will well and truly account for the proceeds of said sale, and that the said proceeds shall be vested in such other property as the said administrator shall deem most for the interest of said widow and orphan jointly, shall be authorized to sell the right which is in said John Cook, deceased, to said tracts of land." The bond given by the administrator wholly omits the last provision, that the proceeds shall be vested in other property. It is urged in argument that this condition is supplied by another, the same in effect, that he will account for the proceeds. We have no power to substitute an equivalent, and if we had, we do not regard this as an equivalent condition. In 1837, sixteen years after the passage of this act, the administrator made a final settlement of his account, in which he charges himself with seven hundred dollars as the price of this land, and shows it to be at that time still due from him. This plainly shows the wisdom of the provision, and proves the necessity of exacting its strict observance. That which was intended as a present, immediate benefit to the widow and orphan by the legislature, was withheld, until one, after the lapse of years, has sunk into the grave, and the other com-

pelled to resort to equity for relief. If the administrator had given the proper bond, compliance with this condition could have been enforced, and the rights of the parties secured according to the intention of the law-makers. Upon this point we come to the same conclusion with the chancellor, and in this respect direct his decree to be affirmed.

We have examined the record attentively to see if the condition to purchase other property had been complied with after the sale, notwithstanding the failure to give the bond. We can not discover that it has. If the administrator had in fact done that which he was required by law to do, it would be hard to set aside the sale for the failure alone to give the bond, when the object of the bond had been fully attained. One of the answers sets forth the payment of seven hundred dollars to the widow in 1833, and alleges that the other seven hundred dollars was received by the administrator, and returned in his account. The exhibit, which is made in support of this part of the answer, is a receipt for a promissory note of the respondent, and there is no evidence that it was ever paid. We can not think that anything less than full and complete subsequent compliance would dispense with the previous condition.

There is nothing in the situation of the title to the land at the time it was sold, which prevents the rendition of a decree, declaring the purchaser, and those claiming under him, trustees for the complainants. Neither can we yield to the objection, that no decree can be rendered against Mrs. Newman for the part which she holds, upon the ground that she is a purchaser for valuable consideration, *bona fide*, and without notice. That doctrine applies almost solely to cases of fraudulent conveyances. In these, a purchaser of that kind without notice of the fraud, is not affected by it, although his vendor might be liable: *Bean v. Smith*, 2 Mason, 252; 4 Kent, 464. But this is a wholly different question, it is one of power alone. Did the administrator have power to pass the title? He had not, because he had not done an act which he was bound to perform before the right to exercise the power could come into existence. As the original purchaser acquired no title, neither could the derivative purchaser.

Thus far we affirm the decree. But we are of opinion that an account between the parties should have been directed; and for this purpose we remand the cause. The following principles will form the basis of the account. Those of the parties who are or have been in possession of the land, will be charged with a

reasonable rent for the same, during the time they have been respectively in possession. They will be allowed a credit for all permanent and valuable improvements now on the land, according to their present value; but not so as to exceed the aggregate value of the rents. In other words, the complainants are not to be required to pay any money for the improvements beyond the rents. Interest will be charged on the rents from the time they fall due. The complainants will be charged with the money paid to the government of the United States to perfect the title to the land, with legal interest from the time when paid. They will also be charged with any money paid to them, or to Margaret Cook, the widow of John Cook, deceased, the guardian of the female complainant, either in her own right, or as such guardian, on account of said purchase, likewise with interest. They will be charged with any money paid to the administrator by the purchaser, which was by said administrator applied in payment legally of the debts of his intestate, or actually paid to the complainants or to said Margaret Cook in her life-time by said Belfield Wrenn, the administrator. In calculating the interest, no rests to be allowed. The respondents not to be credited with any payments to the administrator, nor paid by him to said Margaret Cook, or the complainants, nor applied in payment of debts of the estate by him; because in the absence of the required bond, they would be held bound to see to the application of the purchase money. The account as to rents and improvements, at the request of either of the parties in possession, may be so taken as to exhibit a separate statement as to each of the tenants. These directions are not intended to exclude any other matters which may be deemed pertinent by the chancellor. The costs of the court will be paid by the complainants, the respondents having succeeded in their effort to procure the taking of an account.

Cause remanded to the superior court of chancery, the decree being in part reversed.

SHEARKEY, C. J., gave no opinion.

STATUTE SHOULD BE MANIFESTLY UNCONSTITUTIONAL to warrant the court in declaring it void: *City of Louisville v. Hyatt*, 36 Am. Dec. 594; *Lane v. Dorman*, Id. 543, and note.

SPECIAL ACT AUTHORIZING SALE OF DECEDENT'S PROPERTY is constitutional: *Lane v. Dorman*, 36 Am. Dec. 543, and note, referring to other cases in this series.

PRIVATE ACT OBTAINED BY FRAUD may be relieved against in a court of law or equity: *Campbell's Case*, 20 Am. Dec. 360. However, fraud in obtaining an

act of the legislature will not be presumed, but must be clearly proved before the court will pronounce the act void: *Derby T. Co. v. Parks*, 27 Id. 700.

BONA FIDE PURCHASER FROM ONE WHO HAS NO TITLE or authority to sell acquires no title against the true owner: *Williams v. Merle*, 25 Am. Dec. 604; *Saltus v. Everett*, 32 Id. 541.

OMISSION OF ADMINISTRATOR TO GIVE BOND on sale of real estate, as required by law, does not make the sale void: *Wyman v. Campbell*, 31 Am. Dec. 677.

CASES
 IN THE
SUPREME COURT
 OF
MISSOURI.

WILLIAMS v. VANMETER.

[8 MISSOURI, 339.]

WARRANT OF ARREST IS ADMISSIBLE IN EVIDENCE in an action for a malicious prosecution, although the offense is not legally set forth in the warrant.

IN ACTION FOR MALICIOUS PROSECUTION PLAINTIFF MUST SHOW a want of probable cause, and malice, either express or implied, in the defendant. Malice may be inferred from the want of probable cause, but the want of probable cause can not be inferred from malice, however rancorous.

SLIGHT EVIDENCE OF WANT OF PROBABLE CAUSE is required, as it involves a negative.

ACQUITTAL OF PLAINTIFF IS EVIDENCE of the want of probable cause to go to the jury, but of itself, without other circumstances, is not sufficient.

INSTRUCTIONS.—When instructions are given by the court, although taken separately, each might be exceptionable, yet if taken together as a whole, they contain a correct exposition of the law of the case, the judgment will not be reversed.

IN ACTION FOR MALICIOUS PROSECUTION, the answer of the justice who issued the warrant of arrest to a question asked by the defendant as to what he (the justice) thought of the plaintiff, and whether he was not subject to the vagrant law, is admissible in evidence as a part of the *res gestæ*.

INDUCEMENTS, HOWEVER STRONG, HELD OUT BY THE JUSTICE TO DEFENDANT to institute the prosecution, are inadmissible to disprove malice, or in mitigation of damages.

ERROR to the Cooper circuit court. The opinion states the case.

Leonard, Richardson, and Adams, for the plaintiff.

Hayden and Miller, contra.

By Court, SCOTT, J. This was an action for a malicious prosecution, instituted by Vanmeter against Williams, in which Van-

meter had a verdict and judgment. It is deemed unnecessary to set out the various counts in the declaration, as the point made by the defendant below (Williams), in relation to the refusal of the court to strike out the second count, was abandoned on the argument of the cause. On the trial in the court below, the plaintiff offered in evidence a warrant issued by J. N. Laurie, a justice of the peace, directed to the constable of Boonville city, reciting, that whereas information, on oath, had been given to him by F. A. Williams, that Robert Vanmeter, an able-bodied man, who, not having wherewithal to support himself, is found loitering about, and commanding him to take the body of the said Vanmeter, and bring him before the justice, to be dealt with according to law. The said Laurie was then introduced as a witness, who testified, that Williams, at the time the warrant was issued, asked him if he had ever examined the vagrant law? to which the witness answered, he had not; that witness and Williams then examined the statute relative to vagrancy, and Williams inquired of the witness what he thought of the plaintiff, Vanmeter, and if he was not subject to said law? Witness answered said inquiry, but the court would not permit the witness to state what his answer was, to which the counsel for the defendant excepted. The witness then testified, that after he had returned an answer to Williams' question, Williams put his finger on the first section of the vagrant act, and observed, "I give the information." At the instance of the plaintiff below, the court gave the following instructions: 1. That if the jury believe, from the evidence, that the prosecution by defendant of the plaintiff was without probable cause, then they may infer that the prosecution was malicious, and if they so find the facts, they ought to find for the plaintiff; 2. That the discharge of the plaintiff, by the examining magistrate, is presumptive evidence of want of probable cause. To these instructions the defendant excepted.

The defendant then asked the following instructions: 1. That unless the jury believe that the defendant was instigated by malice, and also that there was no probable cause for the prosecution, that then they must find for the defendant; 2. That in this case it is not necessary to prove that the plaintiff was a vagrant, and if there was any probable cause for the prosecution, they must find for the defendant; 3. That it is incumbent upon the plaintiff to prove both malice in the defendant and a want of probable cause for the prosecution; 4. That the acquittal of the plaintiff, by the justice of the peace, is not sufficient in itself to

show the want of probable cause. The court gave all these instructions but the third, the refusal to give which was excepted to by the defendant.

The first point made by the defendant was, that the court erred in admitting the warrant in evidence, as there was a variance between it and the declaration. The declaration alleges, that the defendant falsely and maliciously, and without any probable cause, charged the plaintiff with a certain offense punishable by law, to wit, vagrancy. It is not denied but that the allegation in the declaration is sufficient. But because the offense is not legally set forth in the warrant, therefore it is urged, that it should have been rejected as evidence. It is not perceived on what ground this exception is founded. The conduct of the defendant gives the cause of action; he lodges the information with the officer issuing the process; and because that officer commits an error, and insufficiently describes the offense in his warrant, is his conduct thereby palliated or justified? The injury to the accused is the same, whether the warrant is legal or illegal, the defendant is the cause of the prosecution, and will he be heard to say, that although he did all he could in furtherance of it, yet as the officer erred in describing the offense for which the prosecution was instituted, he is therefore excused? If an information of one offense was given, and a warrant issued for another offense entirely different, and a suit was instituted for a malicious prosecution of the offense described in the warrant, it would fail, as it would not appear that the prosecutor had given the information which caused the issuing of the process. But that is not this case. It sufficiently appears that the warrant was intended to arrest the plaintiff for the offense communicated by the defendant, and because it is not legally set forth, it can not avail him: *Miller v. Brown*, 8 Mo. 127 [23 Am. Dec. 693].

The refusal of the court to give the third instruction asked by the defendant is also assigned for error. It can not be denied but that instruction asserted a correct legal principle. In an action for a malicious prosecution, the plaintiff must show a want of probable cause, and malice, either express or implied, in the defendant. Malice may be inferred from the want of probable cause, but the want of probable cause can not be inferred from malice, however rancorous. The instruction might have been given, but inasmuch as the principle it asserted had been announced to the jury as law in two previous instructions, the court was under no obligation to declare it a third time.

It was contended by the defendant, that the second instruction given at the instance of the plaintiff was erroneous, inasmuch as it conveyed the idea that the bare acquittal of the plaintiff by the justice was evidence from which the jury might infer a want of probable cause. It can not be maintained that, in an action for a malicious prosecution, proof that the defendant instigated it, and a production of the record of acquittal, will entitle the plaintiff to a verdict. However, but slight evidence of the want of probable cause is exacted of the plaintiff, as it involves a negative; but we are not aware that the bare production of the judgment of acquittal has ever been held sufficient for that purpose. The acquittal, together with the circumstances under which it was effected, may be sufficient, as in the case put, where, upon the calling of the cause, the prosecutor, who was in court, absented himself. It was left to the jury to infer the motives of his withdrawal, and they were charged, that they might infer the want of probable cause from such conduct. An acquittal is evidence of the want of probable cause to go to the jury, but of itself, and unaccompanied with any circumstances, would not be sufficient.

When instructions are given by the court, although taken separately, each might be exceptionable; yet if, taken together as a whole, they contain a correct exposition of the law of the case, the judgment will not be reversed. Whatever objection might have been urged to the instruction complained of, and although of itself it might have conveyed an erroneous idea of the law, yet, taken in connection with the fourth instruction given at the instance of the defendant, the ground of complaint is removed. The two instructions were not contradictory, but, taken together, they furnished a correct exposition of the law.

The judgment of the court below is also sought to be reversed, because the court refused, as evidence, the answer given by the justice to the inquiry of the defendant, what he (the justice) thought of Vanmeter, and if he was not subject to the vagrant law? It is contended, that the answer of the witness should have been received as explanatory of what was afterwards said by the defendant. Courts can not be too cautious in receiving testimony irrelevant in itself, and of a character to bias or mislead the jury. But however important a rigid observance of this caution may be, it can not be carried so far as to prevent a full disclosure of whatever may be necessary to explain declarations or acts, the subject of judicial inquiry. If testimony, otherwise inadmissible, is offered for this purpose, it should be received with

a direction by the court to the jury of the object of its introduction, and a charge that it is inadmissible for other purposes in the cause. In the case of *Hawkins v. The State*, 7 Mo. 190, it was held, that the questions asked by a negro of a white person were admissible in evidence, in order to a correct understanding of the answers. The questions were not regarded as hearsay evidence, but as facts, as a part of the *res gestæ*; and being proved by competent evidence to have been proposed, were properly admitted. It has been remarked that the circumstances surrounding a principal fact under consideration, termed the *res gestæ*, may always be shown to the jury along with such fact; and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion, it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description. The principal points of attention are, whether the circumstances and declarations offered in evidence were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character. Thus, in the trial of Lord George Gordon, for treason, the cry of the mob who accompanied the prisoner in his enterprise, was received in evidence as forming a part of the *res gestæ*, and showing the character of the principal facts. So, where a person enters into land for any purpose, or changes his actual residence, or is upon a journey, or leaves his home or returns thither, or remains abroad, or secretes himself, or, in fine, does any other act material to be understood, his declarations made at the time of the transaction and expressive of its character, motive, or object, are regarded as verbal acts indicating a present purpose and intention, and are therefore admissible in proof like any other material facts: they are parts of the *res gestæ*: Greenl. 120.

It is easy to conceive, that, in numberless instances, the answers and replies of one in conversation with another can not be understood without showing the declarations and remarks which elicited the answers. We are of the opinion that the court might have received the reply of the justice in evidence, not as hearsay, but as part of the *res gestæ*, and as explanatory of what followed, with a direction to the jury of the purpose for which it was admitted. But if we view the matter in a light most favorable to the defendant, and take it for granted that an answer most calculated to instigate him to give the information which he afterwards lodged against the plaintiff was made by the justice, yet the judgment will not be reversed, as any inducements, however

strong, held out by the justice to the defendant, to institute the prosecution, were inadmissible to disprove malice or in mitigation of damages. It has been held, that in a prosecution for a malicious arrest, it may be given in evidence that the party acted under the advice of counsel. In analogy to that case, the defendant, in actions like this, would probably be permitted to show, that in good faith, and upon a full representation of all the facts, he was advised by counsel that a prosecution was warranted. But to permit the counsel of those whose capacity we have no means of judging, and who owe no responsibility to the courts, to be received as evidence, would lead to collusion, and furnish a ready defense in all actions like the present. As this evidence was inadmissible to disprove malice, it could not be received in mitigation of damages, as it could only produce that effect by showing a want of malice.

Judgment affirmed.

MALICIOUS PROSECUTION: The cases in this series relating to the various branches of this subject are referred to in the notes to *Hickman v. Griffin*, 34 Am. Dec. 124; *Yocum v. Polly*, 36 Id. 583; *Grant v. Denel*, 38 Id. 228; *Cockfield v. Braveboy*, 39 Id. 123; *Hitchcock v. North*, Id. 540; *Seibert v. Price*, 40 Id. 525.

COPY OF INDICTMENT IN FORMER ACTION IS ADMISSIBLE in an action for a malicious prosecution; the original need not be produced: *Fant v. McDaniel*, 2 Am. Dec. 660. Discharge by *nolle prosequi* is not *prima facie* evidence of malice, or of want of probable cause, to sustain an action for a malicious prosecution: *Yocum v. Polly*, 36 Id. 583.

ERRONEOUS INSTRUCTIONS ARE NOT CURED by the fact that correct instructions accompany them: *Hickman v. Griffin*, 34 Am. Dec. 124; and a denial of motion for instructions containing several propositions is not error if any of the propositions are untenable: *Whiteford v. Burckmyer*, 39 Id. 640. The principal case was cited to the point, that where two instructions, each imperfect in itself, amount to a correct statement of the law when taken together, the error would be disregarded, in *Pond v. Wyman*, 15 Mo. 181.

POINTS TO WHICH PRINCIPAL CASE HAS BEEN CITED.—To the effect that malice may be inferred from want of probable cause: *Casperson v. Sproule*, 29 Mo. 43; and as supporting the position that a party is not protected by showing that he acted on the advice of a person not a lawyer: *Murphy v. Larson*, 77 Ill. 176; but that he might show that he acted on the advice of a lawyer: *Hill v. Palm*, 38 Mo. 21; though the advice of a justice of the peace does not protect him, this case not being within the meaning of the rule: *Moore v. Sandorin*, 42 Id. 494. The case of *Brant v. Higgins*, 10 Id. 728, was an action for a malicious arrest in an action of detinue; the plaintiff introduced a verdict in his favor in that action as evidence of want of probable cause. The court instructed the jury that this verdict was evidence that the action was wrongful and without probable cause, and that but slight additional evidence thereto was necessary. On appeal, this instruction was held erroneous. The court said: "The remarks of this court, in the case of *Williams v. Vanmeter*, must be understood in connection with the facts upon which they were based.

That was an action for a malicious prosecution, and the plaintiff had been discharged by the committing magistrate. Although that discharge was not regarded as sufficient of itself to establish the want of probable cause, yet it was considered as evidence of such a character as to require but slight additional evidence to make out the plaintiff's case. But these observations of the court in that case would be very inappropriate to a verdict by a petit jury in a civil case."

RECTOR v. HARTT.

[8 MISSOURI, 448.]

NO PARTICULAR FORM OR CEREMONY IS NECESSARY IN DEDICATION OF land; it may be without deed or writing; all that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation.

PARTY ATTEMPTING TO OBTAIN ADVANTAGE IN CONSEQUENCE OF HAVING MADE DEDICATION will be required to give ample proof of that fact.

PARTY CAN NOT CLAIM THAT HE HAS MADE DEDICATION of the land so as to prevent a sale of it on execution against him, when it was laid off as a town by persons holding adversely to the claimant, the latter having never recognized the plat so made.

IN SHERIFFS' SALES, LAND MUST BE SUFFICIENTLY DESIGNATED or described; and no land passes unless described with reasonable certainty.

LAND IS SUFFICIENTLY DESCRIBED IN SHERIFF'S SALE when a quarter section is sold as described on the public survey; though a part of the tract is covered with the plat of a town; the defendant being the owner of the entire quarter section, with the exception of one lot, and the streets and alleys being unopened, designated by no monuments, covered with brush and timber, and there being but a single highway through it.

SALES IN MASS BY SHERIFF, of distinct parcels of real estate, are not *ipso facto* void; the act concerning executions (Rev. Code, 1825, sec. 13), providing that real estate levied upon shall be divided when sold, is directory merely, and a violation of its injunctions will not make a sale void, although it may be good cause for setting it aside on proper application.

IDEM.—Sales in mass by a sheriff, of distinct parcels of real estate, may be set aside on motion, or by a bill in chancery.

ERROR to the Cooper circuit court. The opinion states the case.

Hayden and Miller, for the plaintiffs in error.

Leonard, contra.

By Court, SCOTT, J. This was an action of ejectment, commenced by G. C. Hartt against Charles Rector, for the northwest fractional quarter of section thirty-five, in township forty-nine of range seventeen west, situate in Cooper county: the plaintiff had verdict and judgment. On the trial, the plaintiff gave in evidence a patent from the United States to Henry Car-

roll, G. C. Hartt, and Robert Wallace, assignees of the pre-emption of Hannah Cole, for the tract of land in controversy, dated the nineteenth of November, 1822, and proved that the defendant was in possession of a part of the tract of land in dispute at the commencement of this suit. The defendant read in evidence the transcript of a judgment of the supreme court of this state, in the name of *T. A. Smith v. G. C. Hartt and G. Tenville*, and an execution thereon for the sum of five hundred and eighty dollars and costs, directed to the sheriff of Cooper county. It appears from the record, that, under this writ, the sheriff sold the land in controversy, together with other real and personal estate of G. C. Hartt, for the sum of three hundred and sixty dollars and thirty-one and one quarter cents, on the seventeenth of February, 1829. A deed was executed by the sheriff to W. M. Adams, the purchaser of the land in dispute, which was described in the advertisement of sale as the north-west fractional quarter section thirty-five of range seventeen west, and of township forty-nine, containing one hundred and fifty-two acres, or thereabouts. The deed conveyed to him, for the sum of one hundred dollars, all the right, title, claim, and interest of the said G. C. Hartt in the said tract. This deed was dated the seventeenth of February, 1829, and acknowledged at the same term of the Cooper circuit court of the same year.

The plaintiff then read in evidence a plat of the town of Boonville. This plat was not authenticated in any manner: it was not signed or acknowledged by any person. The clerk of the Cooper circuit court testified that he had been in the office about ten years; that the plat was in the office when he first went into it, and is attached by a wafer to the last page of deed-book A., and immediately following the last deed in said book, which was recorded on the twenty-fourth of June, 1820.

A second plat of the same town, similar to the first, with an addition of town lots, was also given in evidence. No marks of authenticity were on this plat: in this respect it was like the first. There was a memorandum on the plats, that full lots are ninety feet by one hundred and fifty; that the streets are seventy-five feet wide, and the alleys fifteen. The last plat was laid off on a page of deed-book B, and immediately succeeding the page upon which a deed is recorded, dated twenty-eighth February, 1824, and immediately preceding the page on which a deed was recorded on the first of April, 1824. The county surveyor being introduced as a witness, in answer to the question whether the first plat was a plat of the town of Boon-

ville, testified, that the lots, names and widths of streets, corresponded with some in Boonville, and that he had always taken it to be a plat of said town; that the last plat only varies from the first by a small addition to the number of lots; that for seven or eight years he has surveyed lots in Boonville, and been guided by one or the other of said plats; he knew of no other plat but these, which he first saw in the year 1835; that there are two hundred and thirty-five lots on the plat, forty-eight of which are on the land in dispute.

The town of Boonville was first laid off in 1816 or 1817: the town was first built upon the land in dispute: at one time there were eight or ten families upon it; before 1830, they all, except one, had removed from it. A witness testified, that, as agent for Mary Gilmore, he, with Morgan and Lucas, made a donation of land to Cooper county for a seat of justice, in 1817 or 1818, and that he knew lots were sold prior to that time by Morgan and Lucas; that he, as attorney for Mary Gilmore, referred to a plat of Boonville, in conveying, as early as 1819; that the town was laid off by Morgan and Lucas, on a New Madrid location; that Hartt pretended to no claim until after the town was laid out, and always claimed adversely to Morgan and Lucas. The plaintiff gave in evidence three several deeds—one executed by himself; one by himself, H. Carroll, and B. Lockhart; and one by the three last-named grantors and Robert Wallace, bearing date respectively twenty-eighth of December, 1821, twenty-sixth of January and January 29, 1820, releasing to the several alienees therein named, for the sum of five dollars, by them severally paid, all their right, title, interest, and estate in those several lots in the town of Boonville, and describing the said lots by reference to the town plat above mentioned: one of these three lots was on the tract of land in dispute. Witnesses intimate with plaintiff testified, that they never knew him to recognize the town laid out by Morgan and Lucas, who claimed adversely to Hartt; that all the families but one on the fractional quarter section in controversy abandoned it before February, 1829, and went to live on lots donated to the county. No stakes, stones, or monuments designated the boundaries of the lots; that the land was covered with brush and wood; no indication of a town; but one road passed through it; it was known that part of it had been laid off into town lots; it was not inclosed. Hartt frequently complained of persons cutting timber in streets and alleys, and forbade them from so doing. A son of the only tenant who continued upon the land, testified that

he came to Boonville in 1818, and lived with his father until his death in 1826; that his father never claimed title under Hartt; that Hartt frequently forbade him from cutting trees on the streets and alleys; that there were four different occasions upon which Hartt interdicted him from cutting timber; that on two occasions, after he had cut wood in the streets, Hartt took it from him, and hauled it away; that he was once cutting a bee tree in a street, and Hartt came to him and forbade him from so doing; he told Hartt he was cutting in a street; Hartt replied, "It is immaterial—it is all private property;" that he cut trees between the years 1820 and 1825.

Robert Wallace testified, that he was one of the part owners of the pre-emption on the north-west fractional quarter section thirty-five, township forty-nine, range seventeen; that he had sold lots by their number, according to the plat, but did not recollect ever to have heard Hartt speak of town lots, as distinguished from the other land in Hannah Cole's pre-emption; but it was usually called, among the owners, "the Hannah Cole pre-emption;" that he came to Boonville in 1817; that Hartt, Carroll, and himself never laid off any town lots on the land, nor did they ever offer any lots at public or private sale; the New Madrid claim was located in the name of Thomas Hupp; that he made a deed of release to Thomas Rogers, above mentioned, without any other consideration than to release any right he might have under the pre-emption, and to quiet his title under the New Madrid claim; that he had an interest of about one sixteenth in the pre-emption.

Amongst others, the court gave the jury the following instruction: That, if the jury find that before the issuing of the execution against Hartt and Tennille under which the sale to Adams was made, a portion of the quarter section of land in controversy, embracing lot number 113, was, and had been, laid out into town lots, streets, and alleys, for separate enjoyment by persons claiming the land adversely to Hartt, or those under whom Hartt claims, and that a plat of the lots, streets, and alleys had been, and was, deposited in the office of the clerk of the circuit court of Cooper county; and that afterwards, and before the issuing of the said execution in favor of Smith, Hartt, or those under whom Hartt claims, adopted such laying out of ground into town lots, streets, and alleys, by conveying to others any of such lots so laid out, and describing the same in the deed of conveyance by reference to the plat, or by any other act; and further find, that the sheriff sold the whole

quarter section in one lot to Adams, as alleged in Adams deed; that such sale is void, and does not divest the plaintiff of his title created by the patent, unless the jury find, from the evidence, that Hartt desired the sheriff to sell the whole quarter section together.

The merits of the case will arise upon this instruction given by the court, at the instance of the plaintiff Hartt. As much has been said in relation to the dedication of the streets and alleys on the north-west quarter section thirty-five (the land in dispute), and as a contrariety of opinion is entertained as to the evidence of a dedication, we will bestow a little attention on that subject, although, in our opinion, it is beside the points on which this case must turn. One can not but remark on the novelty of the position of the parties, in relation to this question. The owners of lots in a town or city are not contending with the original proprietors of the ground for the use of streets and alleys, which, they allege, has been granted to the public, but the proprietor himself is endeavoring to show, that he has made a dedication of streets and alleys for the benefit of others. If the owner of land had an intention or desire of making such a disposition of his property, it is strange that he should be at any difficulty in manifesting it, when he could so easily have placed the fact beyond all cavil or doubt. The doctrine seems well settled in America, that an owner of land may, without deed or writing, dedicate it to public uses. No particular form or ceremony is necessary in the dedication: all that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation: *City of Cincinnati v. White's Lessee*, 6 Pet. 440. So it has been held, where the owner of land in a city sells building lots, bounding them by streets of a specified width, as laid down on a map, but not actually opened, the purchasers acquire a legal right, as against their grantor, to have the streets opened to the width delineated on the map, and the streets will be deemed to be dedicated to the public: *Brooklyn v. Patchen*, 8 Wend. 47.

Admitting the correctness of these principles—and they go the full length of the doctrine contended for by Hartt—will they warrant the instruction given by the court below? That instruction assumed, that Hartt adopted the plan of the town of Boonville, by conveying to others any of the lots designated on said plan, and describing the same in the deed of conveyance by reference to the plat: that is, if the jury found that he had conveyed a lot by reference to the plat of the town, then they ought

to find that he had made a dedication of the streets and alleys to the use of the public. Let it be borne in mind, that Hartt himself is endeavoring to show that he made a dedication, and is seeking to deprive another of his right in consequence of such an act. It was easy for him to have put this matter beyond all uncertainty. As he is attempting to obtain an advantage in consequence of having made a dedication, it will be no hardship to require of him ample proof of the fact, for it was in his power to make it. He is not to be allowed to adopt a mysterious course in the disposition of his property, and lie by and take advantage of errors which he has caused by his own conduct. As Hartt set up the pretension of a dedication, what rule or principle prevented the defendant from showing that no such dedication was made? If the public was interested in establishing the fact that these lots had been set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law would consider it in the nature of an estoppel *in pais*, which would preclude the original owner from revoking such dedication: 6 Pet. 440. All the principles contained in the books in reference to the dedication of private property for public use, have been maintained and adopted, and asserted in controversies in which others have been contending with the owner. It is a new doctrine that a party can, without authority of law, create an estoppel for himself, and be permitted to say he is estopped by his own act. It is for others to interpose the objection of an estoppel, and not for him who created it. If the jury had not been tied down by the instruction of the court, it is impossible to read the evidence preserved in the record, and entertain a moment's doubt but that they would have found a verdict, negating the fact that there had been any adoption by Hartt of the plat of the town of Boonville. The town was laid off by Morgan and Lucas, who claimed adversely to Hartt: afterwards, Hartt and others purchased a pre-emption from Hannah Cole, which covered part of the land laid off into lots. Hartt and his co-tenants, after acquiring the pre-emption, released their right and title to three lots on the town plat, and in the deeds described the lots by reference to the plat. This is all the evidence necessary for him by the terms of the instruction, to introduce, in order to establish a dedication; and, opposed to this, we find Hartt claiming adversely to Morgan and Lucas, prohibiting the cutting of trees on the streets and alleys on various occasions, taking away wood cut by others, and when told it was on streets and alleys, saying: "It was immaterial—it was

all private property." He never sold a lot, unless the three quitclaim deeds can be called such. May not the reference to the plat, in the quitclaim deeds, have been made simply to enable him to describe the lots, as otherwise it might have been a matter of difficulty to give them a sufficient designation?

But if anything were wanting to show that Hartt never intended to adopt the plat of Morgan and Lucas, it is his failure or neglect to cause a map or plat of the town to be made out, acknowledged, certified, and deposited with the recorder, in pursuance of an act concerning plats of towns and villages, approved eighteenth December, 1824. That act was retrospective; and, by the second section, required that in all cases where any town, or addition to any town, shall have been laid out within this state, previous to the taking effect thereof, the proprietor of such town should, within one year after the taking effect of said act, cause a map of such town to be acknowledged in the same manner as a deed for land, certified and deposited with the recorder of the county in which the town is situate, otherwise no lot could be sold, under a penalty of two hundred dollars. There were forty-eight lots on the tract of land in dispute: the title to one only of these lots had passed from Hartt, and that by one of the three quitclaim deeds before mentioned; and no plat was acknowledged and deposited with the recorder within the year prescribed by the said act, whereby Hartt was rendered incapable of selling a lot without incurring a penalty of two hundred dollars, a sum much greater than its value, if we may judge of the worth of such property from the evidence in the record. It is begging the question to say that the dedication had been made prior to the act of 1824, and therefore was not required to be acknowledged and deposited with the recorder. Thus much as to the effect of the evidence of an adoption of the plan of the town by Hartt; but the admissibility of that evidence may be questioned.

On what principle is a party permitted to introduce his own acts as evidence for himself? We know the declarations or admissions of a party to the record, when against his interest, are sometimes admitted as evidence on his behalf, and so when they constitute a part of the *res gestæ*; but do these deeds, executed by Hartt, fall within either of these principles? Had this plat been acknowledged and deposited with the recorder, under the act of 1824, it would have been evidence of a dedication; but Hartt has not adopted that mode of evidencing his intention; and if he is now straitened to do it, it must be laid to his own

neglect. Let it be assumed that Hartt adopted the plat of the town which partially covered the quarter section in controversy; then it is contended by him, that the sale of the land in dispute, by the description of the north-west fractional quarter section thirty-five, township forty-nine, range seventeen, is void, for uncertainty in the description of the property sold. Of the forty-eight lots laid off on the land, forty-seven were the property of Hartt, the only one disposed of being that before mentioned as conveyed to Rogers. So Hartt was the owner of the whole quarter section, with the exception of a single lot! On the other hand, it is contended, that the acknowledgment of a sheriff's deed is a judicial act, and is in the nature of a judgment of confirmation, which cures all defects in the mode of sale, which the court issuing the process had the power to remedy.

If the court has jurisdiction of the case, the parties, and power to order the sale by a writ, a sale so made and a deed acknowledged can not be set aside in a collateral action. This principle has been maintained by courts, in states whose mode of disposing of a debtor's real estate is different from that adopted by our laws: *Thompson v. Phillips*, Baldw. 272. In Pennsylvania, where this doctrine obtains, the question raised by the defendant in error, in consequence of the mode of conducting sheriffs' sales of real property, would rarely arise. The point is, that the sheriff's deed is void for uncertainty in the description of the estate sold, just as a common law deed would be held void for uncertainty, in not describing with sufficient precision the thing conveyed. This illustration, however, is not intended to convey the impression that no more certainty of description is required in a sale and conveyance by a sheriff, of real property, than in the deed of an individual conveying his own estate: in these, the maxim prevails—"Id certum est, quod certum reddi potest." Not so in sheriffs' sales. Where land is taken and sold by a sheriff absolutely, without any appraisalment or right of redemption in the debtor, the law, at least, has enjoined it on the officer that it shall be done in such a manner as to prevent sacrifices and speculation; hence our courts have adopted the rule, that in sheriffs' sales no land passes but what the creditor can enable him to describe with reasonable certainty: the land must be sufficiently designated or described. This was the principle of the case of *Evans v. Ashley*, 8 Mo. 177, and was the principle of the various cases cited in the opinion delivered in that cause. In the controversy now under consideration, the sher-

iff sells a quarter section of land, as described on the public survey; about twenty-five acres of that tract is covered with the plat of a town; the defendant is the owner of the entire quarter section, with the exception of a lot ninety by one hundred and fifty feet; the streets and alleys are unopened, designated by no monuments, covered with brush and timber, with a single highway through it. Can the description of the sheriff be said not to be reasonably certain? In what respect is it uncertain? Do streets and alleys which have no existence in reality affect the description? or is it affected for the reason that there has been drawn on paper a plat of a town, which at some future day may be reared on the land? Does the fact, that a single lot is owned by another, make such a degree of uncertainty in the description as to render the sale void?—or is it to be held, that in a sale by a sheriff, of one hundred and fifty-two acres of land, otherwise properly described, the circumstance that a half-acre of the tract is owned by another is to avoid a sale and conveyance for uncertainty in the description of the estate?—and because this is true, therefore the reverse of it is likewise so—that a sale of a lot containing a half-acre by the description of a quarter section containing one hundred and fifty-two acres, is likewise valid? Or will it be contended, that, in the case of *Jackson v. Rosevelt*, 13 Johns. 97, if the sheriff had sold the Hardenburgh patent, instead of all the lands of Lawrence Van Kluch in that patent, that the former description would be sufficient to pass the lands of Van Kluch, but the latter would not? If the rule can be evaded in this way, it is not worth the breath that is spent in giving it utterance.

It is next objected by the defendant in error, that the whole quarter section, embracing as well the forty-eight town lots in which part of the tract was subdivided, as the residue of the quarter section, containing about one hundred and thirty acres, was sold in mass, and not in separate parcels, and this is such a gross abuse of power on the part of the sheriff as does of itself, in point of law, annul the sales, no matter what may have been the intent of the sheriff or purchaser. This position asserts the principle, that a sale in mass, by the sheriff, of real property, consisting of separate and distinct parcels, is absolutely void; or, in other words, that no title passes by a conveyance under such a sale, and the deed will be regarded as a nullity, under whatever circumstances it may be set up. The act concerning executions (Rev. Code, 1825, sec. 13), under which the sale in question took place, directs that in all cases where exe-

cution shall be levied upon any real estate, the sheriff or other officer levying the same shall divide such property, if susceptible of a division, and sell only so much thereof as will be sufficient to satisfy such execution, unless the defendant shall desire the whole of any tract or lot of land to be sold together, in which case it shall be sold accordingly. We regard this statute as directory. A violation of its injunctions will not make a sale void, although it may be good cause for setting it aside on proper application. A similar statute in New York has received a similar construction: *Groff v. Jones*, 6 Wend. 522 [22 Am. Dec. 545]; an authority entitled to respect, not only from the acknowledged ability of her judges, but from the fact that her mode of conducting sales of real estate under execution conforms more nearly to ours than most of the states. In the case of *Hicks v. Perry*, 7 Mo. 346, it was held, that the section of the statute above cited was designed to prevent a sheriff from selling more land than was necessary to satisfy an execution, and that it was not applicable to sales in which the whole tract was insufficient for that purpose. We are not to be understood as maintaining, that a sheriff in all cases, when the whole of a debtor's real estate was insufficient to satisfy an execution, would be upheld in selling it altogether. This is a matter about which it is impossible to prescribe any definite rule. Each case must be governed by its own circumstances. It is easy to state instances, at the mention of which every one would be startled, while others may be supposed which would meet with our approbation. The law has intrusted the officer with a discretion in conducting sales of land, and confides that he will exercise that discretion in a manner most beneficial to all concerned, reserving a power in the courts to control and correct that discretion, when it has been abused, by setting aside his sales. To establish it as an inflexible rule, that all sales of distinct parcels of real estate in mass would be void, and so regarded in all proceedings, would, in many instances, seriously prejudice the debtor, and, by destroying the confidence of the public in such auctions, would cause a sacrifice of property. Who would buy an estate at a sale conducted by an officer, if, at any distance of time thereafter, it might be declared void, on the ground that he had improperly exercised a discretion with which he was intrusted by law?

Let it not be supposed that we entertain the opinion, that a sale can not be set aside when an officer has been guilty of an abuse of discretion in making it. It would be a stain upon our

jurisprudence if such a power did not exist in the courts. All that is intended to be said is, that a sale in mass by a sheriff, of distinct parcels of real estate, is not *ipso facto* void. None of the authorities cited by counsel maintain such a principle. The case of *Rowley v. Brown*, 1 Binn. 62, was a direct application to the court to set aside a sale, on the ground, that the parcels of the property taken in execution were distinct, and should have been sold separately. The motion was sustained. The court said it was a rule to disallow, in every case, a lumping sale by the sheriff, where, from the distinctness of the items of property, he can make distinct sales. There may be exceptions, but the purchaser must bring himself within them. The case of *Tiernon v. Wilson*, 6 Johns. Ch. 414, was a bill in chancery, brought by the debtor against the sheriff and purchaser, to set aside a sale, where, on an execution for ten dollars and twenty-five cents, the sheriff sold two lots containing, together, four hundred and forty acres, a moiety of which belonged to the defendant, and was worth eight hundred dollars, for the sum of thirteen dollars. The sale was set aside. The chancellor, in delivering his opinion, observed, it is difficult to define precisely the extent of property that a sheriff may sell together in mass. There must be a sound discretion exercised by the officer, and each case will furnish a rule applicable to it under all the circumstances. The point was made in the case of *Jackson v. Newton*, 18 Johns. 355, but not determined by the court. This was an action of ejectment, brought by a purchaser under a sheriff's sale, against a tenant, who held adversely to the debtor. There was a sale by the sheriff of specific forms and lots of land together, and it was held, that a doubt could not be entertained, but that the court would have set it aside upon a direct application. Sales in mass, of real estate, held in several parcels, are not to be tolerated; they are oppressive and unnecessary, and deserve animadversion. So in the case of *Nesbitt v. Dallam*, 7 Gill & J. 512 [28 Am. Dec. 236], the sale was set aside, because the sheriff had sold in mass divers lots of ground situated in the same town, but separate and distinct from each other. On a motion to vacate it, the court held such a sale was to be regarded as *prima facie* void, and he who seeks to sustain it must show its justice and expediency. This was a direct application to the court to set aside the sale. We subscribe to the principle to be extracted from these cases, that a sale in mass, by a sheriff, of distinct parcels of real estate, may be set aside on motion, or by a bill in chan-

cery, and they, in our opinion, furnish no foundation for the contrary rule attempted to be set up, that such a sale is *ipso facto* void, and will be so regarded in a collateral proceeding. Were we without the experience of others to guide us to a correct conclusion on this subject, we must confess that the mildness and conservative tendency of the former rule, when contrasted with the harshness and severity of the latter, could not but win our approbation.

Judgment reversed, and cause remanded.

NAPTON, J., did not sit in this cause.

LAND MAY BE DEDICATED WITHOUT DEED: *State v. Trask*, 27 Am. Dec. 554, and note, where this subject is discussed at length; *Vick v. Vicksburg*, 31 Id. 167; *Dummer ad. Den*, 40 Id. 213; *Lebanon v. Warren Co.*, 34 Id. 422. The principal case was cited to support this position in *Becker v. City of St. Charles*, 37 Mo. 18, and was referred to as supporting the position that no particular form was necessary in a dedication, in *Futherford v. Taylor*, 38 Id. 319.

LAND MUST BE DESCRIBED WITH REASONABLE CERTAINTY in a sheriff's deed: *Jackson v. Delancy*, 7 Am. Dec. 403; *Broughton v. Birchmore*, 18 Id. 654; *Vance v. McNairy*, 24 Id. 553; *Cain v. Maples*, 26 Id. 184; and see *Waters v. Duvall*, 33 Id. 693; *Parker v. Swan*, 34 Id. 619. The principal case was regarded as authority for the position that land must be sufficiently designated in execution sales, in *Wooters v. Arledge*, 54 Tex. 397; and was referred to approvingly in *Ott v. Soulard*, 9 Mo. 597.

SALE EN MASSE OF DISTINCT TRACTS, EFFECT OF: See *Nesbit v. Dallam*, 28 Am. Dec. 236; and see *Patterson v. Carneal*, 13 Id. 208, and note. *Rector v. Hart* was cited as holding that sales *en masse* were not *ipso facto* void, in *Kelly v. Hurt*, 61 Mo. 468; *Boullin v. Ewart*, 63 Id. 336. The statutory provision that no more real estate shall be exposed to sale than shall appear necessary to satisfy an execution is directory only, and though not complied with, a sale to a *bona fide* purchaser is nevertheless valid: *Groff v. Jones*, 22 Am. Dec. 545. To the position that this is the effect of the Missouri statute, the principal case is cited as authority in *Fine v. St. Louis Public Schools*, 39 Mo. 173.

THE PRINCIPAL CASE came before the court again in 7 Mo. 531, and 13 Id. 497.

ST. LOUIS INSURANCE CO. v. GLASGOW.

[8 MISSOURI, 713.]

LOSS OCCASIONED BY MISCONDUCT OF INSURED, where the misconduct amounts to barratry, is not within the terms of a policy, where there is no express insurance against barratry.

NEGLIGENCE OR MISCONDUCT ON THE PART OF THE INSURED or his servants or agents, will not exempt the underwriters, where the loss is occasioned by a peril insured against.

INSURED MUST PROVIDE VESSEL WITH COMPETENT MASTER; and if he fails to do this, he must bear the loss resulting from the incompetency; but

when he has selected a master of ordinary prudence and skill, he has complied with his whole duty, and he does not warrant that during the voyage the master shall not be guilty of negligence, unskillfulness, or misconduct.

WARRANTY THAT BOAT SHALL BE COMPETENTLY PROVIDED WITH MASTER, officers, and crew, is not broken by laying the boat on the dock for repairs, and giving her over to the control of workmen or laborers.

DECLARATION ON POLICY OF INSURANCE SHOULD AVER that the boat was competently provided with master, officers, and crew, when the assured agrees that the boat shall be so provided.

APPEAL from the circuit court of St. Louis. The opinion states the case.

Spalding and Tiffany, for the appellants.

H. R. Gamble, contra.

By Court, **NAPTON, J.** This was an action of covenant on a policy of insurance, brought by Glasgow, Shaw & Larkin against the insurance company. The policy was for six thousand dollars on one fourth of the steamboat Pizarro, for one year, against the ordinary perils of "rivers, fires, enemies," etc., and the assured agreed, "that the steamboat aforesaid should be competently provided with master, officers, and crew." The declaration contains no averment of a compliance with the agreement, that the boat should be competently provided with "master, officers, and crew," but avers the loss to have happened within the year, and by fire, whilst the boat was lying at St. Louis.

The defendants filed several pleas, five of which were demurred to, and the demurrer sustained. These pleas are numbered on the record, the fifth, sixth, seventh, eighth, and an additional plea. The fifth plea alleges, that the loss in the declaration mentioned was occasioned by and through the mere carelessness, negligence, and misconduct of the plaintiffs, their servants and agents, then and there in the possession, charge, and control of said boat. The sixth plea avers, that, "just before the loss in the declaration mentioned, the plaintiffs, their servants and agents, caused the said steamboat to be put on a dock, called a floating dock, by means of which dock the boat was raised out of and above the surface of the river, and so continued until the loss; and while the boat was in that situation, the plaintiffs, their servants and agents, caused a fire to be made and kept in a stove on the deck of the boat, and caused large quantities of picked oakum to be placed and spread upon the deck of the boat, about and near the fire so made and kept by the plaintiffs, their servants and agents, whereby and by means

whereof the peril and danger of consuming, burning, and destroying said boat by fire, was enhanced and increased, without the knowledge, privity, or consent of the defendants, contrary to the tenor and effect, true intent and meaning of the policy." In the seventh plea, it is alleged, that, "before and at the time of the loss, the steamboat was on the floating dock, above the surface of the Mississippi; and just before the loss, certain workmen and laborers in the retainer of the plaintiffs, caused a fire to be made in a stove on board the boat, and then and there, near and about the fire, picked a large quantity of combustible material, called oakum, and spread the said oakum about and near the fire, whereby the peril and danger of burning said boat was greatly increased, and, by the mere carelessness, negligence, and misconduct of said workmen and laborers, the said oakum was set on fire, and by the fire so occasioned the said boat was burned," etc.

The eighth plea states, "that just before and at the time of the loss, the said steamboat was not in the possession, nor under the care or control of the plaintiffs or other owners, the master, officers, and crew, or the servants and agents of the owners, or any of them, but the said boat, at the time when, etc., was in the possession of certain workmen and laborers, with the knowledge, privity, and consent of the plaintiffs, and without the knowledge, privity, and consent of the defendants, contrary to the intent of the policy, and while said boat was so in possession, and under the care and control of said workmen and laborers, the said boat was burnt, consumed, and destroyed, by the mere carelessness, negligence, and misconduct of the said workmen and agents, which is the same loss," etc.

The additional plea alleges, "that just before the loss, the plaintiffs and their servants and agents, without the knowledge or consent of the defendants, caused the boat to be put and placed on the floating dock, and raised above the water, and so kept until at and after the loss; and while the boat was so lying on the dock above the Mississippi river, and just before the loss, the workmen engaged in the retainer of the plaintiffs, in repairing the boat, did, unnecessarily and improperly, without the knowledge or consent of the defendants, cause a fire to be made and kept on board said boat, in a stove there, and did then and there unnecessarily and improperly put, place, and spread, near and about said fire so made and kept, and at other places in and about said boat, a large quantity of a certain combustible material, called picked oakum, whereby the danger and peril of fire

and the burning of said boat, became and was improperly and unnecessarily greatly increased and enhanced, contrary to the duty of the plaintiffs, their servants and agents in that behalf, and the meaning of the policy; and afterwards, while the said boat was so on the said dock, above the surface of said river, and while the said picked oakum was so kept and spread on and about the said boat, was then and there set on fire, and burned, and by the burning of said oakum, and the fire so occasioned, the said steamboat was burned," etc.

The only question presented by the record is, the propriety of the action of the circuit court in sustaining the demurrer to the above pleas. Upon this question several points have been made, but the most important one arises out of the fifth, sixth, and eighth pleas, in which the loss is averred to have been occasioned by the negligence, carelessness, and misconduct of the agents of the assured. As the point is also involved in the consideration of the other pleas, it will first be disposed of. It has been admitted in the argument of this case, and the adjudged cases fully sustain the admission, that where the misconduct amounts to barratry, and there is no express insurance against barratry, the underwriters will not be responsible for a loss occasioned by barratrous conduct of the agents of the insured. It is also agreed, that where the insured have not complied with their express warranty, that the vessel shall be competently provided with master, officers, and crew, a loss occasioned by such non-compliance is not covered by the policy. Some of the pleas demurred to are referred to this principle, and their sufficiency will be considered hereafter.

The question is, whether, when the insured have provided competent officers and crew, and the boat has been furnished with the necessary tackle and appurtenances, in compliance with the express warranty in the policy, the underwriters are discharged from a loss occasioned by a peril insured against, by showing that such peril was brought about by the negligence or mismanagement of the agents of the insured. Upon this question the counsel for the appellants has presented in his brief, a critical review of all the authorities, reaching back to some of the earliest English cases. We shall not attempt to reconcile the cases thus arrayed, nor to defend the opinions and course of reasoning which have given occasion to the comments, and in some instances to the censure of the learned counsel. An examination of the cases will, we think, show, that since the case of *Busk v. Royal Exchange Company*, 2 Barn. & Ald. 73, de-

cided in 1818, nearly every court in which this question has arisen has manifested a decided inclination to hold the underwriters responsible for losses occasioned by a risk insured against, notwithstanding such loss may have been attributable to the negligence or misconduct of the assured or his agents: *Walker v. Mailland*, 5 Id. 171; *Bishop v. Pentland*, 7 Barn. & Cress. 219; *Patapsco Insurance Company v. Coalter*, 3 Pet. 222; *Columbia Insurance Company v. Laurence*, 10 Id. 507; *Waters v. Merchants' Insurance Company*, 11 Id. 213; *Perrin's Administrators v. The Protection Insurance Company*, 11 Ohio, 147 [38 Am. Dec. 728].

The doctrine established by these cases, we consider founded on principles of sound policy. It does not depend upon the insertion of barratry, as one of the risks assumed, but it arises from the fact that the loss happens by a risk aimed against, and that to permit the insurer, in such cases, to show that it can be traced, either immediately or remotely, to some negligence, carelessness, inattention, or misconduct of the owner or his agents, would be to raise an implied warranty, not of the general competency of master, officers, and crew, but of their diligence at all times, and under all circumstances. To adopt this construction of the policy would certainly tend to great embarrassment in the recovery of claims clearly understood to be secured by the contract of the parties. It would be imposing upon the assured a liability which is certainly not to be found in the words of his contract, and not, as we think, justified by its spirit. He is bound to provide competent officers, and to have his vessel seaworthy, but he does not stipulate that these officers shall be exempt from the frailties incident to men in all situations; that they shall exercise such diligence as shall prevent all losses from mistakes, carelessness, and negligence. If the negligence be what is called *crassa negligentia*, which is by some writers considered synonymous with fraud, the case is different, and the underwriters are exempt upon another principle, unless fraud also is expressly insured against. Indeed there are few of the risks contained in the common marine and river policies, which might not be traced to some act of negligence or oversight in those having charge of the vessel. In the case of fire especially, we can not readily conceive of any loss by this element unless in cases of lightning, where it must not necessarily have been the result of some mismanagement on the part of those in command or their servants. To say, in such cases, that though the vessel has been insured against fire, yet the under-

writer has not insured against a fire happening by negligence, would be to "keep the word of promise to the ear and break it to the hope."

It is true that this doctrine, that negligence or misconduct on the part of the servants or agents of the insured will not exempt the underwriters, where the loss is occasioned by a peril insured against, was originally held in cases where barratry was one of the perils enumerated in the policy, and this circumstance afforded the courts a plausible ground for the adoption of the rule. This was the ground taken by Judge Johnson in the case of *The Palapasco Ins. Co. v. Coulter*, 3 Pet. 222, decided in 1830, though Judge Story subsequently intimates, in the case of *Waters v. Merchants' Ins. Co.*, 11 Id. 213, that a majority of the court were for the plaintiff, upon the general ground, that the proximate and not the remote cause was to be looked to. Upon the insufficiency of this course of reasoning, the supreme court of Ohio chiefly relied on the five cases referred to in the brief of the appellant's counsel for adhering to the doctrine supposed to have been settled by more ancient cases, and disavowing and repudiating what was thought to be a mere innovation by the court in *Busk v. Royal Exchange Co.*, 2 Barn. & Ald. 73. In all the English cases, we suppose barratry was among the enumerated perils in the policy, but in the case of *Walker v. Mailland*, 5 Id. 171, though this circumstance is alluded to by the judges, their opinion seems to be founded mainly upon the ground that the immediate cause of the loss was a peril insured against, and the underwriters should not be permitted to show negligence as a cause of such peril, because there was no implied warranty in the policy that there would be no negligence. Bayley, J., says: "It is the duty of the owner to have the ship properly equipped, and for that purpose, it is necessary that he should provide a competent master and crew in the first instance; but having done that, he has discharged his duty, and is not responsible for their negligence as between him and the underwriters." Holroyd, J., says: "This case can not be put on the ground of the breach of the implied warranty to provide a master and crew of competent skill. It is sufficient if the owners provide a master and crew generally competent; there is no implied warranty that such a crew shall not be guilty of negligence."

So, in the case of *Bishop v. Pentland*, 7 Barn. & Cress. 219, the court seem to lose sight of the barratry clause, as affording any reason for their conclusions; and Bayley, J., says: "The cases of *Busk v. The Royal Exchange Co.*, and *Walker v. Mail-*

land, establish as a principle, that the underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks, though the remote cause may be traced to the negligence of the master and mariners." And Holroyd, J., says: "It is clearly established, that if there be an actual stranding, although it arise from the negligence of the master and mariners, the underwriters are liable." *The Columbia Ins. Co. v. Lawrence*, 10 Pet. 508, was a case of insurance against fire on land, but the opinion delivered by Judge Story shows the gradual progress of this doctrine in that court. "In regard to marine policies," says Judge Story, "this was formerly a question much vexed in the English and American courts; but in England, the point was completely settled, in *Busk v. Royal Exchange Co.*, upon the ground that *causa proxima non remota spectatur*; and therefore, a loss whose proximate cause is one of the enumerated risks in the policy, is chargeable to the underwriters, although the remote cause may be traced to the negligence of the master and mariners. Although in that case, the risk of barratry was also assumed by the underwriters, yet it is manifest that the opinion proceeded upon the broad and general ground. The same doctrine was afterwards affirmed in *Walker v. Mailland*, and *Bishop v. Pentland*, and is now deemed incontrovertibly established. The same doctrine was fully adopted in this court, in the case of *The Palapasco Ins. Co. v. Couller*."

These remarks of Judge Story are certainly *obiter dicta*, and may be obnoxious to the severe criticism bestowed on them by the appellant's counsel, but they show that the unsatisfactory reasons given by the British judges for a doctrine advanced, as is now said, for the first time in 1818, were no obstacle to its rapid adoption by other courts, and that this court was even then prepared to sanction it to the same extent it was ultimately settled in *Waters v. Louisville Marine Insurance Company*. In Ohio, the case of *Lodwicks and Kennedy v. Ohio Insurance Company*, 5 Ohio, 433; *Gazzam v. Ohio Insurance Company*, 1 Wright, 202; *Jolly's Ex'rs v. Ohio Insurance Company*, Id. 539; *Fulton & Foster v. Lancaster Insurance Company*, 7 Ohio, 325, were decided since the case of *Busk v. Royal Exchange Company* in England, and they are the only cases to which we have been referred, in which the doctrine held in this last and the succeeding English cases has been expressly denied, that were decided since the year 1818. These cases have all been overruled by the same court, in *Perrin's Adm'rs v. The Protection Ins. Co.*, 11 Ohio, 147 [38 Am. Dec. 728]. Whatever may be thought of the propriety

of that court's yielding to the authority of the supreme court of the United States, in a question upon which the opinion of that court was not binding upon them, it is at least to be inferred, that the policy and good sense of the doctrine must have been most striking, to have induced a court thus to overrule what had been solemnly and repeatedly adjudged in several previous cases.

In opposition to this doctrine, thus authoritatively settled in England, in Ohio, and in the supreme court of the United States, the counsel for the appellants have cited numerous adjudications on both sides of the Atlantic: *Gordon v. Birmingham*, 1 Camp. 123; *Hodgeon v. Malcom*, 5 Bos. & Pul. 336; *Phyn v. Royal Exchange Company*, 7 T. R. 505; *Vos & Graves v. United Insurance Company*, 2 Johns. Cas. 180; *Brasier v. Clapp*, 5 Mass. 5; *Cleveland v. Union Insurance Company*, 8 Id. 308; *Grim v. Phoenix Insurance Company*, 13 Johns. 451. In relation to these cases, it may be observed, that they were all decided previous to 1818. Moreover, many of these cases, though apparently conflicting with the views which now prevail in relation to the duties of the insured, in a marine or river policy, will be found to turn upon that clause of the policy which stipulates for the competency of the master and crew of the vessel. The mere fact of negligence or misconduct is not the leading and prominent feature in the cases; but it is connected with the breach of the express or implied warranty, that the insured will employ competent agents. For instance, the case of *Brasier v. Clapp* was a case in which the captain of the vessel had pursued a route from Boston to New Orleans which was unusual, and Judge Sedgwick, who delivered the opinion of the court, said: "A general position, that the mistake of the captain, under no circumstances, forms an excuse for a deviation, is certainly not true. The most skillful, discreet, and prudent master may, and probably, in almost all long voyages, does commit mistakes, by which his ship may be taken out of the most direct and shortest course. Such is not a deviation that will discharge the underwriters." But he adds: "If the captain had ordinary skill, and was informed, as he ought to have been, as to the voyage he was pursuing, no fact which was exhibited at the trial, or is now pretended to have existed, amounts to anything like a justification or excuse for the deviation on which the defendant relies as having vacated the contract. If such skill and information were possessed by the captain, the deviation would seem to be merely wanton, or done for the convenience of the captain, in landing his wife on the vineyard. On the other hand, if the deviation happened either from

the want of skill or the gross ignorance of the captain, that would doubtless defeat the claim of the plaintiffs to recover; for, among other things which the law, from the nature of the contract of assurance, imposes as obligation upon the assured, is the duty to provide a master of competent skill, prudence, and discretion to navigate the vessel, and if any loss takes place, which may be justly supposed to have happened from a master of that character not having been provided, the underwriters are not responsible for it."

Now there is nothing in this opinion conflicting with the position which we maintain. The insured is bound, by the express stipulations of the contract, to provide a master, and one of competent skill, prudence, and discretion; but it does not therefore follow that he also warrants that the master thus ordinarily competent shall not be guilty of negligence or mistakes. In the case cited, it was a mere question of evidence, and the Massachusetts court only hold that the departure from the usual route, proved in that case, was evidence of such unskillfulness, or gross ignorance in the captain, as showed him not to have been a competent master, within the meaning of the policy, and was therefore such a breach of the warranty as to discharge the underwriters. So, in *Cleveland v. Union Insurance Co.*, 8 Mass. 308, the ship's register was left behind, and a loss by capture ensued; and though it is not pretended that the decision in this case can be reconciled with the doctrine since established, yet the remarks of Judge Sedgwick will show, that the breach of the supposed warranty of the competence and skill of the master is principally relied on to discharge the underwriters. "The principle of an implied warranty," says Judge Sedgwick, "on the part of the assured, that everything shall be done to prevent a loss, pervades the whole subject of marine insurance, or, in other words, that the insurer shall be responsible for no loss but such as is occasioned by some of the perils which, according to a fair construction of the contract, was, in the understanding of the parties, insured against. Hence is the principle, that the insurer shall answer for no loss resulting from the gross negligence or ignorance of the master, or from the want of a competent crew: hence also, the insurer is not liable for any loss or damage which may happen to goods from any fault or defect of the ship, not arising from the violence of the wind or sea, or from an accident or misfortune in the voyage, but from a latent defect before she sailed; hence, too, there is an implied warranty that the ship shall proceed in the usual and common

route, and therefore, a deviation from it discharges the underwriters."

Here the learned judge lays down principles to which, in the main, no exception can be taken. The general principle, that it is the duty of the assured to do everything, on his part, to prevent a loss, is a sound one: among other things, it is his duty to provide his vessel with a competent master, and if he employs an incompetent or unskillful one, he must bear the loss which results from the ignorance, misconduct, or mistakes of such agent. But when the assured has performed his duty in this behalf, and has selected and employed a master of ordinary prudence and skill, it would seem that he had complied with his whole duty, and had fulfilled his part, not only of the letter, but the spirit of his contract. When, therefore, the judge goes further, and requires the insured, not only to comply with his express warranty, by employing competent agents, but to warrant that his agent shall not, during the voyage, be guilty of any act of negligence, unskillfulness, or misconduct, he is imposing an obligation upon the assured not to be found in the contract, nor fairly to be inferred from it, and is making him responsible for the very acts and contingencies against which he seeks an indemnity.

The case of *Grim v. The Phoenix Insurance Company*, 18 Johns. 451, is the strongest case we have seen to establish the doctrine, that a loss by fire, proceeding from the negligence of the master and mariners, is not a loss within the policy, though barratry be one of the risks. That case was decided in 1818, and by a court of eminent ability. We will only remark upon it, that the facts upon which the judgment was founded presented a case of the grossest negligence, though the opinion of the court is placed on the general principle, that underwriters have no concern with the competency or skillfulness of the master and crew, and therefore, any loss occasioned by the carelessness or negligence of these agents does not fall upon the underwriters. This conclusion is not, we think, warranted by the premises. We will only add, that it is somewhat remarkable that the supreme court of New York, and the court of king's bench, about the same time, from the same premises, arrived at conclusions exactly opposite. Whilst the court of king's bench consider the insertion of barratry as one of the perils insured against, as affording the strongest grounds for concluding that the underwriters intended to be responsible for every inferior degree of carelessness or misconduct, the supreme court of New York regard that circumstance as

furnishing a violent presumption that every such negligence and misconduct as did not amount to barratry was not covered by the policy. The decision of the English court is now most generally sanctioned, but the reasons given for the decision, in *Busk v. Royal Exchange Company*, 2 Barn. & Ald. 73 (the case referred to), are certainly not satisfactory, and the New York court was much better warranted, if the clause concerning barratry was to control the decision, in a different conclusion. The case in New York was afterwards reviewed by Judge Johnson, in the *Patapeco Insurance Co. v. Coulter*, 8 Pet. 222, and the opinion was disregarded by the supreme court of the United States.

Upon the whole, without referring particularly to the other cases to which the appellant's counsel has cited us, we are disposed to adopt the views taken by Judge Story in *Waters v. The Merchants' Insurance Company*, 11 Pet. 213. No late case in New York has been cited, from which it could be seen, whether that court would now adhere to an opinion running counter to the current of modern authorities; nor are the cases in Massachusetts of so decisive a character upon the precise question arising in this case, as to afford any obstacle to an ultimate adoption by that tribunal, of the generally received doctrine. In Ohio, as we have seen, the supreme court of that state has readily yielded to the force of authority and reason, notwithstanding several opposing decisions of the same court upon the precise question. The doctrine is firmly established in England and in the federal courts. Under these circumstances, the case being of the first impression here, this court can not hesitate, especially as we venture to affirm that the doctrine is most consonant to the terms and spirit of the policy of insurance, and commended by every principle of sound public policy.

The second point made by the appellants is founded on the eighth plea. That plea alleges, that, at the time of the loss, the boat was not in the possession or under the control of the master, officers, or crew, or any of the servants or agents of the owners, but under the control of certain workmen and laborers, with the privity and consent of the plaintiffs. The question is, whether this is any breach of the warranty, that the boat shall be competently provided with master, officers, and crew. It is certainly the duty of the owners to see that the vessel is repaired, when repairs are necessary, and it is not charged that repairs were in this case unnecessary, or that any unusual or illegal mode or plan of repairs was pursued: nor is it pretended, that a boat placed on a dry-dock, for repairs, should have a full

complement of officers and crew; but it is urged, that the owners should have at least some one to attend to their interests, and watch the safety of the vessel, whilst it is undergoing repair. Now, if we are compelled to give the warranty a literal construction, the presence of a single watch, on the part of the owners, would surely not be a literal compliance with the warranty; for master, officers, and crew are all required. But to contend that a vessel on shore, or laid up on dock, must have the same number of hands which would be necessary to enable her to pursue a voyage, would be so manifestly against the true intent and meaning of the contract of insurance, that it is not urged. If the vessel was abandoned on shore, to the hands of strangers, or was hauled on shore, and converted into a shop or store, as was suggested in the argument at bar, such a state of facts would clearly discharge the underwriters, because it was not contemplated in the policy that the boat should be appropriated to any such purposes. But it is within the contemplation of both parties, that the boat will need repairs, and for that purpose, that it must be delivered over to the care and custody of the mechanic who undertakes the work; and it is not shown that it is customary or proper that the owner should appoint an agent to watch the boat or the workmen whilst in this condition. If there be such a custom, it should be pleaded: *prima facie*, I should suppose it unnecessary. Such is not the law or custom in relation to other bailments; and if there be any custom which requires it, in the cases of boats or vessels, it should be shown.

The next point we will consider, is the fifth point made in the appellants' brief, and involves the sufficiency of the additional plea. The same defense attempted to be set up in this plea, is also contained in some of the other pleas; but as the additional plea contains a more minute and perfect statement, and is not liable to some objections which are urged against the others, we shall consider this plea only, as embracing a statement most favorable to the appellants. This plea, in substance, alleges, that whilst the boat was on the St. Louis dry-dock for repairs, the workmen unnecessarily and improperly made a fire in the stove, and unnecessarily and improperly placed and spread a large quantity of picked oakum near to the said stove, by means of which the risk of firing the boat was increased, and whilst in this situation the loss happened. The defense is designed to embrace a mere variation or increase of risk, and a loss during, but not the consequence of such increase or change of risk. We are not disposed to deny the general proposition, that a

variation or increase of risk will, in some cases, perhaps in all cases where such increase of risk is the cause of loss, discharge the underwriters. It is upon this principle that a loss from deviation falls upon the owners. It is because such variation is against the letter or the intent of the policy. Thus, in the case of an insurance against fire on land, the house insured is described in the policy as a brick house separate and apart from other buildings, covered with tin, etc., and the insured builds a frame house immediately in contact with the house insured. The frame building takes fire, and the fire is communicated to the house insured. Here has been an increase of risk, by the act of the insured, against the obvious intent and meaning of the policy, and the underwriters might well claim an exemption from such losses: *Stetson v. Massachusetts Mutual Fire Insurance Company*, 4 Mass. 330 [3 Am. Dec. 217]. So also, where an insurance is effected on a voyage, the termini of which are designated in the policy, a deviation from the usual course of such voyages discharges the underwriters, upon the principle that the risk is varied, whether increased or not, and is not the same contemplated by the parties.

Admitting this general principle, we are yet constrained to view the additional plea as a mere plea of negligence, and that it does not contain the allegations necessary to bring it within the class of cases in which a variation of risk is admitted to be a good defense. The plea alleges negligence and misconduct, setting forth the circumstances in which that negligence consisted. It avers, that whilst the boat was on the dry-dock, the workmen engaged in making repairs, unnecessarily and improperly made a fire in the stove, and unnecessarily and improperly spread picked oakum near said fire, and that this enhanced the risk of setting fire to the boat. Had the plea alleged that the boat was unnecessarily and improperly placed on the dock, and that, whilst in that situation, the workmen unnecessarily and improperly built a fire, etc., it might have been regarded as of the character designed, and the defendant must have taken issue upon it, or set up a special custom, authorizing the boat to be placed upon such dock. As it is, it is difficult to distinguish it from a special plea of negligence, and therefore involves the same question heretofore considered.

As the declaration contained no averment that the boat was competently provided with master, officers, and crew, and the defendant's demurrer reached back to the declaration, the judgment upon the demurrers should have been for the defendant.

The judgment of the circuit court is therefore reversed, and the cause remanded.

NEGLECT OF EMPLOYERS OF ASSURED, by which the loss is caused, is no defense to an action on the policy: *Perrin v. Protection Ins. Co.*, 38 Am. Dec. 928. Loss occasioned by neglect to employ a pilot, discharges the insurers when the loss was the direct and immediate consequence of the neglect, but not otherwise: *McMillan v. Union Ins. Co.*, 33 Id. 112; and see *Whitney v. Ocean Ins. Co.*, Id. 595.

COMPETENT CREW IS ESSENTIAL TO SEAWORTHINESS of a vessel, but the warranty of seaworthiness is not broken by the occasional absence of a seaman or deck hand upon other duties connected with the voyage: *Caldwell v. Western M. & F. Ins. Co.*, 36 Am. Dec. 667, and a vessel need not be officered and manned when she is laid up in port; and the fact that she is without a crew at such a time does not render her unseaworthy, so as to avoid the insurance: *Bell v. W. M. & F. I. Co.*, 39 Id. 452.

CASES
IN THE
SUPERIOR COURT OF JUDICATURE
OF
NEW HAMPSHIRE.

KING v. CHASE.

[15 NEW HAMPSHIRE, 9.]

FORMER VERDICT AND JUDGMENT ARE PLEADABLE IN BAR, OR ADMISSIBLE IN EVIDENCE, if there is no opportunity to plead them, in a subsequent action between the same parties or their privies for the same cause, and in either case are conclusive.

EVIDENCE ALIUNDE IS ADMISSIBLE TO SHOW WHAT WAS THE MATTER TRIED in a former suit, the judgment in which is offered in evidence in a subsequent suit, if that fact does not appear from the record.

JUDGMENT IS CONCLUSIVE ONLY ON THE MATTER DIRECTLY IN ISSUE in that suit when offered in evidence in another suit, and the matter in issue, under this rule, is that upon which the plaintiff's action proceeds and which is controverted by the defendant's pleadings, and does not include facts offered in evidence and controverted on the trial but not directly in issue.

JUDGMENT AND VERDICT IN TROVER ARE CONCLUSIVE AS TO TITLE to the goods claimed in another action for the same goods, where it is shown by parol that the question of title was the only matter in issue before the jury.

VALIDITY OF MORTGAGE OFFERED AS EVIDENCE OF PLAINTIFF'S TITLE IN TROVER IS NOT IN ISSUE, though it is shown by parol that it was the only question submitted to the jury, and that they found the mortgage fraudulent, and, therefore, a judgment and verdict for the defendant in that suit are not admissible in evidence in another action between the same parties for other goods claimed under the same mortgage.

SHERIFF IS LIABLE FOR ACTS OF HIS DEPUTY in attaching property.

JUDGMENT IN FAVOR OF DEPUTY SHERIFF IS CONCLUSIVE EVIDENCE FOR SHERIFF in a subsequent action, where both actions are for the seizure of the same goods.

TRESPASS for taking and carrying away certain hay and fodder. The defendant was a sheriff, and the trespass complained

of was for a seizure of the goods in question, by one of his deputies, under an attachment against one Oliver King. The plaintiff claimed the goods under a mortgage from King, which was offered in evidence. The defendant claimed that the mortgage was fraudulent, and offered in evidence the record of a certain action of trover brought against the deputy for seizing certain oats claimed by the plaintiff under the same mortgage, in which action the defendant had verdict and judgment thereon, which had been satisfied. The defendant also proved by one of the jurors in the former action, that the validity of the mortgage was the only question submitted to the jury, and that they found it fraudulent. The record was objected to, and evidence was introduced showing that a review of the former action had been brought and was still pending, but the record was admitted. The jury were instructed, that if they were satisfied that the mortgage was passed upon and pronounced fraudulent in the former action, and that the verdict was still in force, they might consider that fact evidence, but not conclusive, that the mortgage was fraudulent. Verdict for defendant, and motion for a new trial.

E. L. Cushing and Hubbard, for the defendant.

Vose and Edwards, for the plaintiff.

By Court, PARKER, C. J. A verdict and judgment between third persons may be offered in evidence by way of inducement, or to establish a collateral fact: Greenl. Ev. 564. In those cases it is only by way of proof of the fact tried or found. And if that matter does not appear, by reason of the generality of the pleadings, it may be made certain by evidence *aliunde*: *Parker, Adm'r, v. Thompson*, 3 Pick. 429. When thus offered, it is usually conclusive evidence of the fact established by it, and no more: See 1 Stark. Ev. 183-187. A verdict and judgment may be used as evidence between the same parties and their privies, as a bar, in another action for the same cause. The matter may be pleaded, if there be an opportunity to plead it. When thus pleaded, it is conclusive. And where there is no opportunity to plead the judgment in bar, it may be given in evidence, and is equally conclusive of the matter which is established by it: *Dame v. Wingate*, 12 N. H. 291.

There are cases which hold that it may be evidence between the parties when offered as a bar, but not conclusive evidence: See *Kinnersley v. Orpe*, Doug. 517. But this can not be supported upon principle. The operation of such a rule would be

to authorize the introduction of the verdict of one jury in evidence, not to show that the matter in question had been tried and settled, but to influence the minds of a jury, having a similar question before them, to find the fact in the same way that the former jury found it—upon the faith that the first jury were capable, and duly investigated the subject upon competent proofs, and therefore probably found the fact correctly. It is quite evident that the weight to be given to it in that view is entirely uncertain. In order to understand its true value, and the weight which ought to be given to it in establishing the matter in question and upon trial, the capacity of the former jurors should be shown, and the manner of the trial, that it may appear how distinctly the proofs and arguments were laid before them. The proofs themselves, and the arguments used on the former trial, should also be shown; for otherwise the second jury could not know whether the case was fully considered. And to all these there should be added a statement of the grounds upon which the former jury proceeded in making up their verdict. It is only upon evidence of this character that the jury, to whose consideration the verdict and judgment are offered as a matter of evidence which should have some influence in determining the disputed fact, can have any reasonable idea how much weight they ought to attach to it. But this evidence they can not have: See 3 Stark. Ev., 1st Am. ed., 1297; 1 Ph. Ev., 5th Am. ed., 323.

If a verdict and judgment are admitted as evidence of any matter tried and found, they furnish evidence that it has passed in *rem judicatam*. If so, that is not a mere matter to influence a jury, or not, according as opinion, whim, or caprice, or even as a sound judgment respecting the competency of the former jury to judge, may dictate. As a mere fact, it has no bearing upon the merits of the case, in connection with other evidence of facts to show the truth of the matter previously found; because it is not a fact which occurred in connection with such other facts, but it is of itself a conclusion, or result, from the consideration, or trial, or admission, of such other facts, or some of them. As evidence to show that the matter in controversy between the parties has been considered, settled, and passed into judgment, it is conclusive.

And here again, if from the general nature of the pleadings the matter which has been tried does not appear upon the face of the record, it may be shown by other evidence: *Young v. Black*, 7 Cranch, 565, 567.

But the judgment is thus conclusive only upon the matter which was directly in issue upon the former trial; and the question arises, what is to be understood by the "matter in issue"? *The Duchess of Kingston's Case*, 20 St. Tr. 361, furnishes the rule. It has been repeatedly sanctioned. "From the variety of cases (said Lord Chief Justice De Grey, in that case), relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar; or, as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment:" See Greenl. Ev. 565; 1 Ph. Ev. 321; Hale's Com. L. 33, note. All are agreed in the rule, but the difficulty lies, in its application, in determining what is meant by a judgment directly upon the point: See 1 Stark. Ev. 190; *Hichin v. Campbell*, 2 W. Bl. 831; *Mallett v. Foxcroft*, 1 Story, 474; *Wadleigh v. Veasie*, 8 Sumn. 165.

Any fact attempted to be established by evidence, and controverted by the adverse party, may be said to be in issue, in one sense. As, for instance, in an action of trespass, if the defendant alleges and attempts to prove that he was in another place than that where the plaintiff's evidence would show him to have been at a certain time, it may be said that this controverted fact is a matter in issue between the parties. This may be tried, and may be the only matter put in controversy by the evidence of the parties. But this is not the matter in issue, within the meaning of the rule. It is that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, which is in issue. The declaration and pleadings may show specifically what this is, or they may not. If they do not, the party may adduce other evidence to show what was in issue, and thereby make the pleadings as if they were special.

But facts offered in evidence to establish the matters in issue, are not themselves in issue, within the meaning of the rule, although they may be controverted on the trial. Deeds which

are merely offered in evidence are not in issue, even if their authenticity be denied. When a deed is merely offered as evidence to show a title, whether in a real or personal action, there is no *non est factum* involved in the matters put in issue by the plea of *nul disseisin*, or not guilty, which makes the execution of that deed a matter in issue in the case, notwithstanding the jury may be required to pass upon the fact of its execution. The verdict and judgment do not establish that fact the one way or the other, so that the finding is evidence. The title is in issue. The deed comes in controversy directly in one sense; that is, in the course taken by the evidence it is direct and essential. But in another sense, it is incidental, and collateral. It is not a matter necessary, of itself, to the finding of the issue. It may be made so by the parties. This may be illustrated by the case before us. Laying out of consideration the question whether this is a case between the same parties, the former action was for taking certain oats. The matter in issue was the title to the oats, and the conversion by the defendant in that case. Upon that the jury passed. They found that the plaintiff had no title, or that the defendant did not convert them, which may be involved in the first. It may be shown by parol evidence, if necessary, upon which ground the verdict proceeded, and it appears in this case that they found the plaintiff had no title. The conversion by the defendant in that case was not denied, if the plaintiff had title.

That matter then is settled. The verdict and judgment may be given in evidence in another action for the oats between those parties, and is conclusive. But that is the extent of what was in issue. It appears that the title set up in that case was by a mortgage. In finding that the plaintiff had no title, the jury must have been of opinion that the mortgage was fraudulent. It is contended that this was in issue and the only matter in issue. But this was only a controversy about a particular matter of evidence, upon which the plaintiff then relied to show title. If that was the only matter in issue, the plaintiff might bring another suit for those oats against the same defendant, and, relying upon some other title than that mortgage, try the title to the oats over again. Can he do so? Clearly not; and the reason is, that it is his title which has been tried and he is concluded. The title, however, which has been tried, was only his title to the oats. The question whether the mortgage was fraudulent came up only incidentally, by reason of his relying on that as his title. But the mortgage was not the matter in

issue: *Towns v. Nims*, 5 N. H. 263 [20 Am. Dec. 578]. And while the finding is conclusive on the question of his title to the oats, it is neither conclusive, nor evidence upon anything else, because nothing else was in issue.

It appears from this that it is important to apply the rule to what was in issue in the action, and not to what was merely incidentally in controversy in the evidence. It is important for the security of both parties.

In this case there might be no great mischief, if the rule was held to apply to the matter in evidence, instead of that in issue. The controversy in the former case seems to have been simple. If the parties were the same, the plaintiff might not complain of injustice if it were held that he is concluded by the finding of the former jury; having once submitted the controversy raised by the evidence, whether the mortgage was fraudulent, to a jury, and their verdict having shown that they must have so found it. But the principle applicable here must be applied in other cases where the matters in evidence are more complicated, and where it would admit of more doubt how the jury regarded the evidence, and what facts they actually found. The rule then would have to be confined to what the jury must necessarily have found, which would still shut out as evidence a great many matters actually tried, and as clearly found as anything found in relation to this mortgage; or it must in many cases be left to the testimony of the jurors what facts they did find, which, when applied to all the controverted matters of evidence arising in a cause, might lead to great uncertainty and confusion. On the other hand, it would be great injustice to the defendant in the former action, to hold that the matter in question was whether the plaintiff's mortgage was fraudulent, or not; that this was tried in that case, and not his title generally; and that the plaintiff might commence another suit for the oats and set up another title, because no other title except the mortgage title had been tried. The title to the property now in question has not been tried. If the plaintiff has no title to it but the mortgage, the defendant may show that the mortgage was fraudulent, by the same evidence by which that matter was shown before.

There are cases which conflict to some extent with the principle we have thus stated; some of them holding that in order to make a record evidence to conclude any matter, it should appear from the record itself that the matter was in issue, and that evidence can not be admitted that under such a record any particular

matter came in question; while others maintain that a former judgment may be given in evidence, accompanied with such parol proof as is necessary to show the grounds upon which it proceeded, where such grounds, from the form of the issue, do not appear by the record itself; provided that the matters alleged to have been passed upon be such as might legitimately have been given in evidence under the issue joined, and such that, when proved to have been given in evidence, it is manifest by the verdict and judgment that they must have been directly and necessarily in question and passed upon by the jury: *Jackson v. Wood*, 3 Wend. 27; *Wood v. Jackson*, 8 Id. 9 [22 Am. Dec. 603]. While on the one hand we do not, with the supreme court, deem it essential that the record should of itself show that the matter was in issue, in order to make the determination of it conclusive; we are of opinion, on the other, that the general principle laid down in the court of errors is too broad, in holding the judgment to be conclusive upon all matters which might legitimately have been given in evidence under the issue joined, and such that, when proved to have been given in evidence, it is manifest by the verdict and judgment that they must have been directly and necessarily in question and passed upon by the jury; as this must include all matters which came in question collaterally, by the evidence offered, if they were of such a nature as that it appears the jury must or should have passed upon them.

Upon the remaining point we are of opinion that there is sufficient privity between the sheriff and his deputy, here, to make the judgment in the suit against the deputy evidence, if it had been upon the same point now in issue. The sheriff is responsible for the acts of his deputy in attaching property. The plaintiff might have sued the defendant for the act of Stebbins in taking the oats. But he had the right also to sue Stebbins himself, and this he elected to do. Having litigated the title to the oats with him, and failed, he ought to be precluded from trying the same matter in another suit against the defendant, on the ground that the defendant is responsible, and that he had a right of action against him also: 1 Stark. Ev. 192-195, sec. 61.

Verdict set aside, and new trial.

FORMER JUDGMENT, ADMISSIBILITY AND EFFECT OF, as a plea in bar or as evidence under the general issue in a subsequent action between the same parties: See *Eastman v. Cooper*, 28 Am. Dec. 600, and note thereto, collecting the previous cases in this series on that subject. See also *Owens v. Dawson*,

Id. 49; *White v. Martin*, Id. 365; *Marsh v. Pier*, Id. 131; *Sumner v. Murphy*, 27 Id. 397; *Gee v. Williamson*, Id. 628; *Noyes v. Evans*, Id. 579; *Sellman v. Bowen*, 29 Id. 524; *Gist v. Davis*, Id. 89; *Hanson v. Buckner*, Id. 401; *Skinner v. Moore*, 30 Id. 155; *Gilchrist v. Bale*, 34 Id. 469; *Garrott v. Johnson*, 35 Id. 272; *Blackmore v. Gregg*, 36 Id. 171; *Nason v. Blaisdell*, Id. 331; *Brown v. Taylor*, 37 Id. 618; *Young v. Rummell*, 38 Id. 594; *Long v. Baugas*, Id. 694, and the notes to those cases respectively. As to the admissibility of a judgment between third parties as evidence, see *Vaughan v. Phebe*, 17 Id. 770; *Richardson v. Hobart*, 18 Id. 70; *Garland v. Rives*, 15 Id. 756; *Newson v. Lycan*, 20 Id. 156; *Lawrence v. Hunt*, 25 Id. 539; *Hooper v. Pair*, 29 Id. 258. That a former recovery is conclusive between the same parties or privies in another action as to the same cause of action or defense, is held, citing the principal case, and others, in *Gray v. Gillilan*, 15 Ill. 461. The case is cited also in 26 Ma. 405. See also Freeman on Judgments, sec. 284, as to the admissibility of a former recovery in evidence under the general issue.

FORMER JUDGMENT CONCLUSIVE ONLY AS TO MATTERS DIRECTLY IN ISSUE in former suit, and not as to collateral matters: See *Manny v. Harris*, 3 Am. Dec. 386; *Coit v. Tracy*, 20 Id. 110; *Wood v. Jackson*, 22 Id. 603; *Beebe v. Bull*, 27 Id. 150; *Garrott v. Johnson*, 35 Id. 272; *Blackmore v. Gregg*, 36 Id. 171; *Nason v. Blaisdell*, Id. 331; *Brown v. Taylor*, 37 Id. 618, and the notes thereto. The principal case is cited as an authority on this point in *Caper-ton v. Schmidt*, 26 Cal. 494, and in *Smith v. McCool*, 16 Wall. 561. As to what is to be deemed to be the matter directly in issue, within the meaning of this rule, the cases are wide asunder, the principal case being a leading one in favor of the restricted rule, that nothing is to be deemed in issue, though controverted upon the trial, except the fact or matter upon which the plaintiff's action proceeds, and which is controverted by the defendant's pleadings: *Garwood v. Garwood*, 29 Cal. 521; *Jackson v. Lodge*, 36 Id. 37; *Fulton v. Hanlow*, 20 Id. 486; *Smith v. McCool*, 16 Wall. 463. The case is approved on this point in *Taylor v. Dustin*, 43 N. H. 493. It is, however, disapproved by Mr. Bigelow in his work on estoppel, p. 90, note. He quotes the opinion of Chief Justice Parker at length, and then says: "We have given Chief Justice Parker's opinion thus fully, that the reader may get the full force of perhaps the most ably considered case upon that side of the question. We are not, however, convinced by the learned judge's reasoning. The decision is not only contrary to the doctrine of other cases (*Bissell v. Kellogg*, 60 Barb. 617; *Wood v. Jackson*, 8 Wend. 9 [22 Am. Dec. 603]), but an examination of the rule of *res judicata* will show its infirmity. This rule is based on the ground that there has already been a fair and full trial of the matter, which one or the other party is endeavoring to litigate again, and the reason why there is no estoppel as to matters not necessarily involved in the decision of the case is, that, from the very fact that they were not of the essence of the action, they would not require, and in all probability did not receive, that searching examination and scrutiny that would be given to a matter in issue, the decision of which would determine the case. But just so soon as any matter, though in itself alone foreign to the cause of action, has become vital to the determination of the case, and the pivot on which the case turns, at that moment it absorbs within itself the entire case; the ground of action is lost in it for the time; and the whole force of evidence, examination, analysis, and argument is directed to the solution of the issue made by it. The main question in the cause, if it had distinctly arisen alone, could not have received a more thorough investigation; and the matter itself, thus in issue, would command as careful a consideration as if it had been the main and only ques-

tion in controversy." The author then proceeds to show that the validity of the mortgage in the principal case must have been as thoroughly litigated in the previous action of trover as if it had been a direct suit to cancel it, and that therefore the verdict should have been held conclusive on that point. He observes, however, that to make the verdict conclusive upon such a matter, it should clearly appear that the whole case turned upon it, and that the cause could not have been decided in the same way on other grounds. We think, with Mr. Bigelow, that the broader rule of *Wood v. Jackson*, 22 Am. Dec. 603, is preferable to that of the principal case, both on reason and authority. The learned author's views are in substantial accord with those expressed by the present editor of this series in *Freeman on Judgments*, secs. 256, 257.

ADMISSIBILITY OF EVIDENCE ALIENDE TO SHOW WHAT WAS IN ISSUE in former suit where the judgment therein is relied on as a bar, or as evidence in another suit: See *Eastman v. Cooper*, 26 Am. Dec. 600, and note, collecting previous cases. The doctrine laid down in *King v. Chase*, on this point, is approved in *Gray v. Gillilan*, 15 Ill. 455; *Lyman v. Becannon*, 29 Mich. 470, and though there are some earlier decisions to the contrary, the rule admitting evidence *aliunde* in aid of the record in such cases is now well established: *Freeman on Judgments*, sec. 273.

SHERIFF'S LIABILITY FOR DEPUTY'S ACTS AND DEFAULTS: See *Campbell v. Phelps*, 11 Am. Dec. 139, and note; *Hasard v. Israel*, 2 Id. 438; *Gorham v. Gale*, 17 Id. 549; *Haines v. Lindsey*, 19 Id. 586; *Fornythe v. Ellis*, 20 Id. 218; *Harrington v. Fuller*, 36 Id. 719.

JUDGMENT IN ACTION AGAINST DEPUTY SHERIFF, EFFECT OF IN ACTION AGAINST SHERIFF.—In *Campbell v. Phelps*, 11 Am. Dec. 139, it is laid down that a sheriff can not be sued jointly with his deputy for a trespass by the latter, because they are not joint trespassers, and that no action will lie against the sheriff for such a trespass, after judgment against the deputy and execution thereon. Mr. Bigelow cites the principal case as supporting this view, but says that "*Campbell v. Phelps* has lately been overruled in Massachusetts: *Elliot v. Hayden*, 104 Mass. 180;" and that "the supreme court of Connecticut have also held the contrary in a case similar in its state of facts," citing *Morgan v. Chester*, 4 Conn. 387, and *Sheldon v. Kibbe*, 3 Id. 214; S. C., 8 Am. Dec. 176. He then proceeds to say: "As a question of principle, there seems to be much difficulty in holding that a judgment against the deputy, in a suit without notice to the sheriff, should conclude the principal. Judgments are conclusive only upon parties and those claiming under them. The sheriff is neither the same party as his deputy, nor is he in privity with him. The relation between them seems analogous to that between joint and several promisors and joint trespassers: *Morgan v. Chester*, 4 Conn. 387; in which case the judgment against one does not extinguish the right of action against the rest." Bigelow on Estoppel, 62. See, on this point, the note to *Campbell v. Phelps*, 11 Am. Dec. 145. Although that case, as shown in the note, was commented on and distinguished, in *Elliot v. Hayden*, 104 Mass. 180, it can not be accurately said to have been overruled by it as stated by Mr. Bigelow. The cases were different. In *Elliot v. Hayden*, a former judgment against a deputy sheriff for a trespass in seizing property under a writ was relied upon as a bar to a subsequent action, not against the sheriff, but against the plaintiffs in the writ, for the same trespass, though the judgment was unsatisfied, and it was held to be no bar. It is true, however, that there are several cases in other states which are in direct conflict with *Campbell v. Phelps*, as shown in the note thereto.

DOW v. SARGENT.

[15 NEW HAMPSHIRE, 115.]

MORTGAGE GIVEN BY BANKRUPT TO BONA FIDE CREDITOR, upon his solicitation, within two months before the filing of a petition against such bankrupt, under the bankrupt act of 1841, is not void as being made in contemplation of bankruptcy, where the bankrupt testifies that though he was then deeply insolvent, he thought himself able to pay his debts, and so represented to the creditor, and that he did not then intend or expect to be thrown into bankruptcy.

WRIT of entry to recover certain land. The plaintiff claimed under a mortgage from one Curtis, executed August 5, 1842. The defendant claimed as purchaser from the said Curtis' assignees in bankruptcy, he having been adjudged a bankrupt upon a petition filed against him by his creditors, September 21, 1842. It was insisted that the plaintiff's mortgage was void under the bankrupt act. The bankrupt testified that the mortgage was given upon the solicitation of the plaintiff to secure a certain note; that he was deeply insolvent at the time, but supposed he could go on and pay his debts, and so represented to the plaintiff and other creditors; that he did not then intend to file any petition in bankruptcy, or expect to have one filed against him, and that before the petition was filed, he had mortgaged all his visible property to different creditors. Verdict for the plaintiff, by consent, subject to the opinion of the court upon these facts.

Pierce and Fowler, for the defendant.

Perley and Ainsworth, for the plaintiff.

By Court, PARKER, C. J. By the second section of the act of congress to establish a uniform system of bankruptcy, passed August 19, 1841, all future payments, securities, conveyances, or transfers of property, etc., made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any creditor, etc., any preference or priority over the general creditors of such bankrupt, and all the payments, conveyances, etc., made or given by such bankrupt in contemplation of bankruptcy, to any person not being a *bona fide* creditor or purchaser, for a valuable consideration, without notice, are to be deemed utterly void and a fraud upon the act; and the assignee in bankruptcy is entitled to claim and recover the same as part of the assets of the bankrupt's estate.

The mortgage to the plaintiff in this case is not within the condemnation of these provisions. It does not appear to have

been made in contemplation of bankruptcy, and the plaintiff was a *bona fide* creditor, who could not have had notice of what, according to the testimony in the case, did not exist. The section then contains two provisos, by which all dealings and transactions by and with any bankrupt, *bona fide*, made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or affected, if the other party to such dealings had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of the act. These provisos certainly do not operate, of themselves, to avoid any transaction between the bankrupt and third persons, nor do they bring any cases within the condemnation of the previous clauses. Their office is to save a certain class of cases from the operation of the general language of the first part of the section. If there have been payments or conveyances by a bankrupt, in contemplation of bankruptcy, and for the purpose of giving a preference, and still the other party acted in good faith, without any notice of any act of bankruptcy, or of the intention of the bankrupt to take the benefit of the act, and more than two months have elapsed before a petition in bankruptcy is filed, such transactions shall not be invalidated or affected. What has been received by a party in good faith, without notice, and permitted to stand so long, shall not be avoided, notwithstanding the bankrupt himself had bankruptcy and the benefit of the act in his contemplation.

Judgment for the plaintiff.

CONVEYANCE IN CONTEMPLATION OF BANKRUPTCY or insolvency, what is: See the note to *Dulaney v. Hoffman*, 28 Am. Dec. 216. See also *Butler v. Breck*, 39 Id. 768.

PREFERENCE OF CREDITORS BY INSOLVENT DEBTOR: See the note to *Crawford v. Taylor*, 26 Am. Dec. 584. See also the cases cited in the note to *Dulaney v. Hoffman*, 28 Id. 219; and *Woodbury v. Bowman*, 31 Id. 40; *Anderson v. Fuller*, 36 Id. 290.

NEW HAMPSHIRE SAVINGS BANK v. COLCORD.

[15 NEW HAMPSHIRE, 119.]

SURETY IS ENTITLED TO APPROPRIATION OF COLLATERAL SECURITY, held by the creditor for the same debt, to the payment thereof, or to have it retained for his benefit and to be subrogated to the creditor's right thereto if he pays the debt.

SURETY IS DISCHARGED BY CREDITOR'S SURRENDER OF COLLATERAL SECURITY held for the same debt, either *pro tanto* or entirely according to the value of the security, if surrendered without his consent, but not other-

wise; nor is such discharge obviated by the creditor's taking additional sureties in lieu of the security so surrendered.

SURETY IS RELEASED BY CREDITOR'S ACCEPTING INTEREST IN ADVANCE beyond the day of payment from the principal debtor without the surety's assent, there being no evidence of any reservation of a right to sue, such acceptance of interest being evidence of a contract to delay.

NEW PROMISE BY SURETY, AFTER DISCHARGE, IN CONSIDERATION OF FORBEARANCE for a definite term, to be holden for a longer period, is binding and waives the discharge, though he had no knowledge of the matters discharging him, if there has been no fraudulent concealment, and if the principal was still liable when the new promise was made.

FORBEARANCE TO PROSECUTE CLAIM WHICH HAS NO LEGAL FOUNDATION is not a good consideration for a promise.

PARTICIPATION OF SURETY IN PAYMENTS OF INTEREST IN ADVANCE furnishes evidence of his assent to the agreement for delay implied from such payment.

NEW PROMISE BY SURETY AFTER DISCHARGE, WITH KNOWLEDGE of the facts discharging him, is binding without any new consideration; otherwise, if he has no such knowledge.

ASSUMPSIT on a note signed by one Brackett, as principal, and by the defendant and others, as sureties. The note was dated August 17, 1837, and was payable on demand, with interest after four months. There was an indorsement of seventy dollars, principal and interest, paid in advance to December 17, 1837, and of sundry other payments of interest in advance up to April 17, 1842. There was evidence that when the note was made, Brackett, the principal, deposited with the plaintiffs as collateral security a note for the same amount by one Leighton, which the plaintiffs afterwards surrendered to Brackett, without the knowledge of the sureties, in consideration of the signing of the note by two additional sureties. A by-law of the bank provided that all collateral securities should be kept and assigned to the sureties upon their making payment. An agreement dated April 17, 1840, was made, and signed by Brackett and the defendant and the two additional sureties, reciting the terms of the note and the names of all the sureties, and the payment of seventy dollars, above mentioned, whereby the parties agreed, in consideration of forbearance for four months, to be bound for six years longer. Other facts appear from the opinion. The jury were instructed substantially in accordance with the doctrines laid down in the opinion, except that it was left to the jury to say whether the defendant was induced to sign the agreement of April 17, 1840, by a fraudulent concealment of the facts, and by a misapprehension of his rights and liabilities. Verdict for the defendant. Motion for a new trial for misdirection.

Ainsworth and Perley, for the plaintiff.

Pierce and Fowler, for the defendant.

By Court, PARKER, C. J. We have repeatedly recognized the rule, originating in equity, but now generally held to be equally a rule at law, that a binding contract for further delay of the time of payment, made between the creditor and the principal, without the assent of the surety, discharges the latter from the obligation of the contract; and it follows, almost as a matter of course, that we should, so far as we may consistently with the forms of proceedings at common law, apply other principles of equity which regulate the relation of principal and surety: *People v. Jansen*, 7 Johns. 337 [5 Am. Dec. 275]. Among these, as we have had occasion to notice in other cases, is one which requires a creditor, who has an obligation, executed by principal and surety, and who has also a collateral security from the principal, to appropriate the avails of the security to the payment of the debt, or to hold it for the benefit of the surety, who, if he pay the debt, will be subrogated to the rights of the creditor. This being the duty of the creditor, if he surrenders such collateral security without the knowledge of the surety, the latter will be discharged entirely, or *pro tanto*, according to the value of the security thus surrendered: *Law v. East India Co.*, 4 Ves. 324; *Baker v. Briggs*, 8 Pick. 122 [19 Am. Dec. 311]; 1 Story's Eq. Jur., sec. 326; *McCollum v. Hinckley*, 9 Vt. 147; *Bank of Manchester v. Bartlett*, 13 Id. 315 [37 Am. Dec. 594]; *Commonwealth v. Vanderslice*, 8 Serg. & R. 457; *Lichtenhaler v. Thompson*, 13 Id. 157 [15 Am. Dec. 581]. But if the surety assent to the surrender, it will not affect his liability. In the present case, the note of Leighton was given up without the assent of the defendant, and, upon the principles above stated, he would be discharged to that extent, if there had been no subsequent transactions affecting his liability. It is true that other sureties were added at the time to the note to the plaintiffs, in lieu of the collateral security which was surrendered. But this substitution could not preclude the defendant from availing himself of the discharge. The additional security thus taken may or may not be as good or better than the note of Leighton, which was surrendered. But it is not a security of the same kind, and possibly might of itself be found objectionable, aside from the surrender. It introduces a new party to the contract itself, upon which the defendant was surety; and, if the defendant is not discharged thereby, would make him liable either as

principal in relation to those who have thus become promisors upon the note without his assent, or as co-surety with them. If the new signers are to be regarded, as they appear upon the face of the note, as co-sureties with the sureties who originally signed it, then those original sureties might, on a failure of the principal, derive a benefit from an addition to the number of those who were to bear the loss. But the operation of that state of the case would be to make them liable to an action for contribution to those with whom they never consented to associate as sureties. If, on the other hand, those who thus signed as sureties upon the surrender of the Leighton note, are to be regarded as the sureties of all who signed it originally, it places the original sureties "in communication" with the new ones in the character of principals; a relation which was certainly new, and might not operate beneficially to them. It is not quite clear that the original sureties might not say, *non in hæc fœdera venimus*, and claim a discharge, because other sureties were added without their concurrence, aside from their claim to a discharge on account of the surrender of the Leighton note. But as the mere addition of other sureties is ordinarily for the benefit of those who are already liable, this may deserve further consideration. It is not necessary to settle it at this time. The reception of the interest in advance, at several times, furnished evidence of a contract to delay, and there is no evidence of a reservation of a right to sue on any of those occasions. This also would have operated to discharge the defendant, if without his assent, and there had been no subsequent transaction to which he was a party: *Crosby v. Wyatt*, 10 N. H. 318.

The defendant, however, can not avail himself in this case of any of the principles which we have stated, because on the seventeenth of April, 1840, in consideration of further forbearance for the term of four months, he agreed along with others to be holden for the term of six years longer, unless the note should sooner be paid. If no one had been liable upon the note at that time, forbearance to prosecute a claim which had no legal foundation would not have constituted a sufficient consideration: *Jones v. Ashburnham*, 4 East, 464; *West v. Ashdown*, 1 Bing. 164; *Gould v. Armstrong*, 2 Hall, 266. But if the defendant and the other sureties might have claimed a discharge at this time, by reason of the previous proceedings, here is a good consideration for the promise to continue liable, because Brackett was not discharged, and the forbearance is to be granted to him

as well as to the rest. It is not like a case of a new promise, or acknowledgment of liability, without any consideration; and we are of opinion that, in the absence of any fraudulent concealment, such new promise must be held to be binding, even if the parties had no actual knowledge of the previous transactions which operated to discharge him. Before he enters into a new agreement upon a new consideration, he should inquire, at the peril of being held thereby to have waived his right to insist upon the discharge, if he neglects the inquiry. This imposes no greater liability upon him than he would have assumed by a promise in writing to be holden for the debt in consideration of forbearance to the maker, if he had not previously been held as surety. And, in the absence of fraudulent concealment, he can not claim to stand in a better situation because he was originally surety, even if he had been discharged.

Again: If it were necessary to show that the defendant had knowledge of the previous surrender of the security, of the addition of the new sureties, and of the contract for delay, in order to bind him by the new promise, there is sufficient evidence upon all these points to authorize a jury to find such knowledge. He had express notice of the addition of the new sureties, for their names are inserted in the new contract as signers of the note, and this should certainly put him upon inquiry how this happened. If he had made such inquiry, he must have learned that they were substituted instead of the Leighton note, which had been surrendered. The new promise not only contains the names of the new signers to the note, but specifies that seventy dollars had been paid upon it. These things tend to show that the note was present at the time, or at least that those who signed the new promise had probably seen it after the new signatures were added, and before the last promise was made. And the case not only shows that along with the indorsements of the seventy dollars, under date of August 21, 1837, there was an indorsement of the interest up to the seventeenth of December following; but it shows also that at the time of the new promise the interest was paid in advance, and that afterwards the defendant participated in such payments; all of which furnishes evidence of his knowledge and assent to what had been done, and to that mode of transacting the business; and if he had that knowledge, he would be bound by the new promise without any new consideration: *Ladd v. Kenney*, 2 N. H. 340 [9 Am. Dec. 77]; *Whitney v. Abbot*, 5 Id. 378; *Thornton v. Wynn*, 12 Wheat. 183; *Hopkins v. Liswell*, 12 Mass. 52; *Martin v. Inger-*

soll, 8 Pick. 1; *Creamer v. Perry*, 17 Id. 332 [28 Am. Dec. 297]; *Mayhew v. Crickett et al.*, 2 Swans. 185.

Without knowledge and without a new consideration, the new promise would not be obligatory: *Farrington v. Brown*, 7 N. H. 271; *Woodman v. Eastman*, 10 Id. 359; *Merrimack Co. Bank v. Brown*, 12 Id. 320; *West v. Ashdown*, 1 Bing. 164; *Goodall v. Dolley*, 1 T. R. 712; *Pitman on Principal and Surety*, 166. There is not only all this evidence, tending to show a knowledge of the real state of the facts, but there is no evidence whatever of any concealment on the part of the plaintiffs. There is nothing, therefore, on which to leave a question of fraud to the jury. For these reasons there must be a

New trial.

DISCHARGE OF SURETY BY INDULGENCE TO PRINCIPAL or by releasing securities: See *Tremper v. Hemphill*, 31 Am. Dec. 673; *Cooper v. Wilcox*, 32 Id. 695; *Cullum v. Emanuel*, 34 Id. 757; *Newell v. Hamer*, 35 Id. 415; *Brinagar v. Phillips*, 36 Id. 575; *Bank of Manchester v. Bartlett*, 37 Id. 595; *Chilton v. Robbins*, Id. 741, and other cases referred to in the notes to those decisions.

SUBROGATION OF SURETY WHO HAS PAID DEBT, to securities and rights of creditor: See *Eddy v. Traver*, 31 Am. Dec. 261; *Cullum v. Emanuel*, 34 Id. 757; *Pott v. Nathans*, 37 Id. 456, and the notes thereto.

FORBEARANCE AS CONSIDERATION: See *Horton v. Cook*, 36 Am. Dec. 151, and cases collected in the note.

STATE v. FOURTH NEW HAMPSHIRE TURNPIKE.

[15 NEW HAMPSHIRE, 102.]

DOCTRINE OF WAIVER OF FORFEITURE OF CHARTER of a corporation by subsequent legislative acts does not apply where by the terms of the charter the franchise absolutely determines upon failure to perform certain conditions.

FORFEITURE OF CHARTER OF CORPORATION MUST BE ESTABLISHED BY JUDGMENT, and can not be inquired into collaterally, where the charter provides that certain accounts shall be rendered to the legislature "under forfeiture of the privileges of the act in future."

STATE ALONE CAN ENFORCE FORFEITURE OF CHARTER FOR NEGLECT TO MAKE RETURNS of the expenditures and profits of the corporation as provided in such charter.

LEGISLATURE MAY WAIVE FORFEITURE OF THE CHARTER of a corporation for breaches of the conditions upon which it was created, by subsequent acts recognizing its continued existence.

ACCEPTANCE BY LEGISLATURE OF SUBSEQUENT ACCOUNTS OF CORPORATION WAIVES FORFEITURE of its charter for failure to render prior accounts.

ACT AUTHORIZING TURNPIKE CORPORATION TO ALTER ROUTE OF ROAD WAIVES FORFEITURE of its charter for a prior neglect to render accounts as required by such charter.

INFORMATION in nature of *quo warranto*. The question which arose on demurrer to the defendant's rejoinder was as to whether certain facts stated in the rejoinder constituted a waiver of forfeiture of the defendants' charter. The facts sufficiently appear from the opinion.

Perley, for the defendants.

Walker, attorney general, for the state.

By Court, GILCHRIST, J. The charter makes it the duty of the corporation to lay before the legislature, at the end of every six years after the setting up of any toll-gate, an account of the expenditures and profits of the road, under the penalty of forfeiting the privileges of the act in future. These accounts, however, were not submitted until the years 1830, 1836, and 1842, in which years they were submitted to the legislature, and accepted by them as sufficient and satisfactory. In the year 1833 the legislature passed an act authorizing the corporation to change the route of their road in certain places. These are the facts laid before us, upon which we are to determine whether the defendants are now an existing corporation. The accounts not having been laid before the legislature, the penalty of forfeiture was incurred in terms. But the subsequent accounts were accepted by the legislature as sufficient and satisfactory, and further powers were conferred upon the defendants by the act of 1833. Has the legislature power to waive the forfeiture? And if it has, do these facts amount to such waiver? These are the questions presented to us by the pleadings.

The doctrine of the waiver of a forfeiture by the legislature by subsequent legislative acts does not apply, if, by the terms of the charter, the franchise absolutely determines on failure to perform the condition; for as in such case the corporation has ceased to exist, the doctrine of waiver is inapplicable. The charter in this case provides that the accounts shall be laid before the legislature, "under forfeiture of the privileges of the act in future." The meaning of this is, that the forfeiture shall be proved in the regular, legal manner; upon the institution and prosecution of proceedings in the established course, such neglect of this duty shall be cause of forfeiture. It probably would not be competent for a debtor of the corporation, when sued, to set up by way of defense that the charter of the corporation was forfeited, unless the forfeiture had been established by the judgment of this court: *Chester Glass Co. v. Dewey*, 16 Mass. 102 [8 Am. Dec. 128]; *Bank of Niagara v.*

Johnson, 8 Wend. 645; *The People v. The Manhattan Co.*, 9 Id. 382. That is a matter to be judicially tried and determined, and not to be inquired into collaterally. Where a charter imposes the duty of making stated returns of the expenditures and profits, the government alone can enforce a forfeiture for a neglect of the duty: *Peirce v. Somersworth*, 10 N. H. 369; *The State v. Carr*, 5 Id. 367. In the case of *The Bear Camp River v. Woodman*, 2 Greenl. 404, the charter was to become void, if, at the end of one year, the river should not be cleared of certain obstructions. In an action of *assumpsit* to recover tolls of the defendant, he offered to prove that the removal of the obstructions had never been effected; but the evidence was rejected at the trial, and the ruling was held to be correct. This case affords a strong illustration of the necessity of specific judicial proceedings for the purpose of causing the charter to be declared forfeited. And in the case before us, we think that by the omission to lay the accounts before the legislature, the corporation did not, *ipso facto*, cease to exist, but proceedings must have been instituted, to establish the fact that the penalty of forfeiture was incurred: *Rex v. Pasmore*, 3 T. R. 244. A *quo warranto* is necessary where there is a body corporate *de facto*, who take upon themselves to act as a body corporate, but, from some defect in their constitution, can not legally exercise the powers they affect to use: Ashhurst, J. Chancellor Kent says that he believes there is no instance of calling in question the right of a corporation, as a body, for the purpose of declaring its franchises forfeited and lost, but at the instance and on behalf of the government: *Slee v. Bloom*, 5 Johns. Ch. 381. In *The People v. The Manhattan Co.*, 9 Wend. 382, Mr. Justice Sutherland says, "where the corporation expires by lapse of time, it may be otherwise, and in such case only." A corporation may forfeit its franchises for misfeasance or non-feasance, but the information for that purpose must be presented under the authority of the state, which must be a party to the suit and a party to the judgment for the seizure of the franchise: *The Commonwealth v. Union Ins. Co.*, 5 Mass. 230 [4 Am. Dec. 50]; *Rex v. Amery*, 2 T. R. 515; *Vernon Society v. Hills*, 6 Cow. 23 [16 Am. Dec. 429].

The corporation, then, being in existence in the year 1830, did the reception of the accounts and the passage of the act of 1833 constitute a waiver of the pre-existing ground of forfeiture, so that it can not now be insisted on? It is said expressly, by Parsons, C. J., in *Commonwealth v. Union Ins. Co.*, 5 Mass. 232

[4 Am. Dec. 30], that the commonwealth may waive any breaches of any condition, expressed or implied, on which the corporation was created. The surrender of a charter can be made only by some solemn, formal act of the corporation, and will be of no avail until accepted by the government. There must be the same agreement of the parties to dissolve that there was to form a compact: *Morton, J., Boston Glass Manufactory v. Langdon*, 24 Pick. 53 [35 Am. Dec. 292]. If acts of the legislature recognize the subsequent and continued existence of the corporation, such recognition will be a waiver of a forfeiture: *People v. Manhattan Co.* In the case of *People v. Kingston Turnpike Co.*, 23 Wend. 193, it was held, that an act extending the time for the completion of the road was not a waiver of breaches of conditions; for such was not expressly declared to be the intent of the legislature, nor was the intent necessarily to be implied from the act. From this position Mr. Justice Cowen dissented, and held that a statute expressly giving time to complete the road was equivalent to a renewal or confirmation of the original charter.

In the present case, the legislature did not expressly declare that they recognized the corporation as in existence, or confirmed its privileges, but we think no other construction can be given to their proceedings. It is a reasonable doctrine, that a breach of condition may be waived. It is an important element in the law relating to landlord and tenant. In *Goodright v. Davids*, Cowp. 803, Lord Mansfield observed that forfeitures are not favored in law, and where the forfeiture is once waived, the court will not assist it: *Coon v. Brickett*, 2 N. H. 163; *Doe v. Pritchard*, 5 Barn. & Adol. 765. There is as much reason for considering the acts of a legislative body as a waiver of a forfeiture, as there is for giving that effect to the act of a landlord. The state can claim no exemption from the ordinary rules which govern contracts, and there is not to be one law for them and another for private persons. The legislature accepted the accounts laid before them in 1830, and the subsequent years, as sufficient and satisfactory; that is, they were satisfied with the accounts as a sufficient compliance with the charter. The act of 1833 is an equally clear waiver of a forfeiture. Notwithstanding what had occurred, they authorized the corporation to alter the route of their road. The act is susceptible of no other construction in this regard, than that the legislature intended to waive any forfeiture consequent on the prior omissions of the corporation. If they had intended to insist on any forfeiture, the act certainly would not have been made. The act was intended to be bene-

ficial to the corporation. But it would not have been so unless they retained the other corporate powers necessary to enable them to carry into effect the purposes of the act. We are, therefore, of opinion that the rejoinder is a sufficient answer to the replication, and that upon the demurrer there must be Judgment for the defendants.

FORFEITURE OF FRANCHISE OF CORPORATION, what will work, and how enforced: See *McIntire v. Zanesville etc. Co.*, 34 Am. Dec. 436; *Boston Glass Manuf. v. Langdon*, 35 Id. 292; *People v. Kingston etc. R. R. Co.*, Id. 551; *People v. Phoenix Bank*, Id. 634; *State v. Bank of Charleston*, 39 Id. 135, and cases cited in the notes to those decisions.

WAIVER OF FORFEITURE OF CHARTER OF CORPORATION: See *People v. Phoenix Bank*, 35 Am. Dec. 634; *Milford etc. Co. v. Brush*, 36 Id. 79; *State v. Bank of Charleston*, 39 Id. 135, and notes. In *Commonwealth v. Tenth Mass. Turnpike Corporation*, 11 Cush. 177, a corporation charter was adjudged to be forfeited by a failure to render accounts as required therein, and a subsequent act of the legislature recognizing the corporation was held not to be an effectual waiver, because after that act the neglect to render accounts continued; which was held to distinguish that case from the principal case.

VALIDITY OR FORFEITURE OF CORPORATE CHARTER CAN NOT BE COLLATERALLY INQUIRED INTO: *Regents v. Williams*, 31 Am. Dec. 72; *Solms etc. R. R. Co. v. Tipton*, 39 Id. 344; *Vernon Society v. Hills*, 16 Id. 429.

JOHNSON v. CUSHING.

[15 NEW HAMPSHIRE, 296.]

ACTUAL EXERCISE OF GENERAL POWER OF APPOINTMENT, by deed or will, converts the appointed estate into assets in equity for the payment of the appointor's creditors, whose claims take preference over those of the appointee, and, upon a bill filed by the creditors, a court of chancery, treating the execution of the power without providing for them as a fraud upon them, will regard the appointor's executor or the appointee as a trustee for the creditors, and subject the estate in his hands to payment of their claims; but the court will not interfere if the power has not been executed and if no act has been done indicating an intent to execute it. **POWER OF APPOINTMENT IS DEEMED GENERAL** for the purpose of subjecting the estate, after appointment, to the claims of the appointor's creditors, whenever the donee may appoint to whom he pleases, although he can appoint only by deed or will to take effect at his death, and can not appoint to any use in his life-time.

BILL filed by creditors of Theodore Sheafe, deceased, against the defendant, executor of the said deceased, to subject certain property in his hands to payment of their claims. Demurrer to the bill. The opinion states the case.

Hatch and Bartlett, for the plaintiffs.

E. Cutts and James Bell, for the defendant.

By Court, PARKER, C. J. Here is undoubtedly a trust in the hands of the defendant. And the statute conferring chancery powers upon this court gives us power expressly in cases of trusts. The jurisdiction to enforce and apply the trust in favor of those legally entitled to the benefit of it, seems to be clear, and is not denied by the defendants: *Parsons v. Parsons*, 9 N. H. 309 [32 Am. Dec. 362]. If the creditors are entitled to relief, according to the prayer of the bill, the attempt to dispose of the property without providing for their payment, may also be treated as a fraudulent execution of the power vested in Theodore Sheafe (he having undertaken to execute it), against which this court should grant relief under its equitable jurisdiction in cases of fraud: *Townshend v. Windham*, 2 Ves. sen. 1.

The bill sets forth that the plaintiffs are creditors of Theodore Sheafe, deceased; that Jacob Sheafe, the father of Theodore, made a will, by which he gave one tenth of his estate to Theodore; that by a codicil he subsequently altered the disposition of that part of his estate, and directed it to be placed in the hands of "his executors, in trust, to appropriate and pay over such part of the net income, rents, and profits thereof, at such times, and in such manner, as said executors should judge proper, for the maintenance of his said son, Theodore Sheafe, and, after the decease of said Theodore, to pay said third part of the residue of his estate, or the proceeds thereof, and such surplus rents, income, issues, or profits, as should have accumulated, and should then remain in the hands or possession of said executors, to the use and benefit of such person or persons as his said son Theodore should limit and appoint by his last will, or other writing by him, signed and sealed for that purpose, in such parts or parcels, for such estates, and with such lawful restrictions, conditions, and limitations as said Theodore should thereby direct, and in default of such appointment, then to the use of the heirs at law of said Theodore: and that the same should be paid, assigned, and delivered over accordingly;" that the defendant is surviving executor, and has the fund; that the executors applied so much of the income as was necessary to the support of Theodore Sheafe during his life; that Theodore Sheafe undertook to exercise the power given him in the will of Jacob, and by his will made a disposition of the property remaining, directing part to be applied to the payment of certain specified debts, and the remainder to be distributed among certain persons named, making no provision for the debts due the plaintiffs. The demurrer admits the facts set forth.

The question is, whether the plaintiffs are entitled to have the trust funds applied, so far as may be necessary, to the payment of their debts.

It appears to be a well-settled principle in equity, that where a person has a general power of appointment over property, and he actually exercises his power, whether by deed or will, the property appointed shall form part of his assets, and be subject to the claims of creditors, in preference to the claims of the appointee: 4 Kent's Com. 333, 5th ed. 339. The principle has been impugned in some cases, and doubts expressed whether its original introduction into the equity jurisprudence was well warranted; but its existence as a part of the system of equity as administered in England for a long period, is not denied: *Lassells v. Cornwallis*, 2 Vern. 465; *Townshend v. Windham*, 2 Ves. sen. 1, and *Shirley v. Lord Ferrers*, there cited; *Hinton v. Tbye*, 1 Atk. 466; *Bainton v. Ward*, 2 Id. 172; *Pack v. Bathurst*, 3 Id. 269; *Troughton v. Troughton*, Id. 656; *Hearle v. Greenbank*, Id. 697; *Thorpe v. Goodall*, 17 Ves. 388; *Barford v. Street*, 16 Id. 135. And we see no reason to gainsay the soundness and justice of it as above stated. Where the owner of property, who has the right to dispose of it in such manner and under such limitations as he pleases, confers upon another the general power of making such disposition of it as he pleases, or, in other words, invests him with all the attributes of ownership over it, and that other accepts the power thus tendered to him, and undertakes to exercise dominion over the subject-matter, as if he was an owner; the original proprietor, having authorized the other to treat it as if it was the property of the latter, by exercising all the power over it which he could exert if it were actually his property; and he having undertaken to treat it as if it was his property, by making a disposition of it under such a power; a court of equity may well do what the parties have done, that is, treat it as the property of the appointor, and make it subject to the incidents attending such property. The court in such case do no more than to treat it as the property of the party, who, by the express authority of the owner, has the power and right to treat it as if it were his property, and who undertakes so to do. The court does not interfere unless the party upon whom the power has been conferred, or to whom it is tendered, has executed it, or done some act indicating an intention to execute it. This is also settled: *Holmes v. Coghill*, 7 Ves. 499, 508; S. C., on appeal, 12 Id. 214.

It has been said that this distinction is a nice one, and not

very satisfactory. "Why," it is remarked, "when the party executes a power in favor of others, and not of himself, a court of equity should defeat his intention, though within the scope of the power, and should execute something beside that intention, and contrary to it, is not very intelligible:" 1 Story's Eq. 188, note; 7 Ves. 499; 12 Id. 214 But the reasons, as it seems to us, may be well explained, upon the principle before suggested. The subject-matter upon which the power is to act, can not be treated as the property of the party having the power to appoint, until he, by his appointment, acts as if it were his property. Where the owner, by some instrument, authorizes another to raise a sum out of an estate, or by way of charge upon an estate, and to dispose of it to such uses as he may appoint, nothing exists in the nature of property in him, or which can be treated as such, until he assents to what has thus been done, by an exercise of the right. Authorizing a party to create a charge upon an estate, if he pleases, does not of itself create one, nor give him any interest in it. But when he assents and creates the charge, within the terms of the power, if the power be general, he has, by the authority of the owner, exercised all the power over the estate, to that extent that an owner could do. There is, then, in existence a fund over which he rightfully claims and exercises dominion, and equity interferes, and holds that this exercise of dominion is subject to the ordinary incidents of an exercise of dominion over property, so far that it can not be given away to the prejudice of creditors.

In several of the cases cited, the fund or property, which the creditors sought to appropriate in satisfaction of their debts, was created only by the execution of the power, but the same principle is applied where the fund or property upon which the power is to act is already set apart and in existence. But, in order to the application of the principle, the power must be a general power, as it is termed, and it is denied in this case that the power of Theodore Sheafe was such a power. This brings us to the question, what is to be understood by "a general power."

From some of the cases it might be inferred that a general power, within the meaning of the rule, existed only in cases where the party having the right to exercise the power, might, at any time after it was conferred, and in any mode, make an appointment for his own use and benefit. Such a construction is, in effect, contended for in this case, as it is objected, not only that Theodore Sheafe could not appoint to his own use, in

his life-time, but that he was restricted to a particular mode of executing it, to wit, by deed or will. The authorities, however, which have been cited on the last branch of the defense, do not seem to sustain the objection. The power may be general in its uses, purposes, objects, and effects, notwithstanding it is required to be exercised in a particular way, as will appear from the authorities hereafter cited. Thus an attorney is said to have a general power to convey the lands of his principal, notwithstanding the law requires, in order to a valid conveyance, that it should be by deed.

More reliance seems to be placed upon the other position, that Theodore Sheafe had not a general power, because he could not appoint to his own use, or the use of any one to take effect in his life-time. And there is, in the language of some of the books, matter having a tendency to support this ground of the defense. Thus in Jeremy's Eq. Jur. 377, it is said, "But it is still to be remembered that the power of appointment must be general, or such as he may execute for any purpose whatever, for if the power be limited in any such manner that he can not by execution procure the benefit to himself, there is no pretense for his creditors to claim it." For the support of this position, reference is there made to 2 Ves. sen. 10, which is the case of *Lord Townshend v. Windham*. Other books hold a language somewhat similar.

The language of Lord Chancellor Hardwicke, in the case cited by Jeremy, if taken disconnected from the facts to which it refers, would undoubtedly appear to sustain the principle asserted. He refers to *Shirley v. Lord Ferrers*, 1 Bro. C. C. 41, and other cases, "which have established the doctrine, that where there is a general power of appointment of a sum of money to charge the estate of a third person, which it is absolutely in his pleasure to execute or not, he may do it for any purpose whatever, and appoint the money to be paid to himself or his executors, if he pleases." And he then proceeds to say: "If he executes it voluntarily, without consideration, for the benefit of a third person, this shall be considered as a part of his assets, and his creditors have the benefit of it. Nor does it differ, whether it is a power to charge a sum of money on land, or to create a chattel interest out of land; for it will depend upon the same foundation, provided it is a general power, which he may execute for any purpose; for if it is a power to appoint a sum among other persons who are at all described by the power, so that it is not absolutely in his power to do it for himself, there

is no pretense that his creditors could have the benefit of it:" *Lord Townshend v. Windham*, 2 Ves. sen. 1.

But it is perfectly evident, on adverting to the facts of the case, that the lord chancellor was then considering the distinction between a power where the persons or objects, in whose behalf, or for whose benefit the appointment was to be made, were, to some extent, limited or restricted, and one where there was no limitation in this particular. If the party having the authority is restricted as to the objects in whose favor the appointment is to be made, it is very clear that the power is not a general one within the rule, for in that case he has not the right to act as if he was the owner. The restraint precludes him from treating the subject-matter as if it was his property, at any time. The facts of that case, and the decision upon them, show conclusively that Lord Hardwicke is not to be understood as asserting that it is necessary, in order to constitute a general power within the meaning of the rule, that the appointor should have the right to reduce the subject-matter into his own possession, or the right to appoint, so that he may take a beneficial use of it himself in his life-time.

The bill was by the creditors of Joseph Windham Ash, the testator, to have an account and satisfaction out of his assets. He was entitled to a large estate for life, remainder to his sons successively in tail, remainder to his nephew, William Windham, in tail, with limitations over. Having no sons, the testator executed an indenture of demise, in 1734, and thereby, in performance it was said of certain promises made before the marriage of his nephew William, let him have possession, immediately, of part of his estate, without paying anything for it; but William covenanted that if, by the testator's death without issue male, it should happen that William, or any heirs of his body, should come into possession of this estate, he would permit such person as the testator should, by deed or will, in his life-time, appoint for that purpose, to enter and receive the rents and profits of the estate, for as long a time as William should enjoy it in the testator's life. In 1742, the testator, by deed, directs all and singular the lands, etc., and all his estate, title, right, and interest, to V. Comyns, his heirs, etc., to take the profits thereof, from and immediately after the death of the testator, in trust nevertheless, to and for the sole and separate use of his daughter Catherine, her heirs, etc., and died in 1746.

"The question was, whether this twelve years' interest in Williams' estate was part of the assets of the testator, or a good

appointment to the daughter." It is apparent from the statement of that case, that the testator had no power of appointment, by the exercise of which he could take anything to his own use in his life-time, for the exercise of the power was, by the terms of it, to become operative only after his decease. There was no attempt to support the bill upon any property, or right of the testator, prior to the demise, or to subject the property to the creditors upon any other ground than the right of the testator under the power of appointment. It was argued for the plaintiffs, that this was part of his personal assets; that a general power was so considered in that court, if executed without a valuable consideration (let it be to whatever persons or uses), because it is that over which he has an absolute property, and shall not therefore give away from his creditors after his death; that if the power was to limit only to particular persons or uses, that, when exercised, is not assets, because to a particular use, etc.; that no power could be more general than the one then in question, as to persons and uses; that the testator might have sold or mortgaged this property, though he could not actually enjoy it in his life; and that, if there was no appointment, it would have gone to the general assignees at law of the testator, the old ownership resulting. *Lassells v. Lord Cornwallis*, 2 Vern. 465; *Shirley v. Lord Ferrers*, 1 Bro. C. C. 41; and *Bainton v. Ward*, 2 Atk. 172, were cited. For the daughter, it was urged that this being to arise on a contingency after the testator's death, there were no words in the conveyance reserving the estate to him, nor of covenant to his executors, but merely to such as he shall appoint, which alone made it different from the cases cited, and that if there was no appointment, it could not devolve on his personal representatives.

Lord Hardwicke said it was insisted for the plaintiffs, that this is such a kind of interest granted as the testator would be entitled to the benefit of, although he had made no particular appointment; but, on consideration, he was of opinion that without making a particular appointment, neither the testator, nor any in his place, could have the benefit of this covenant, that no action of covenant could have been maintained by the executors of the testator, upon the deed, until he made an appointment; that when the testator came to execute the power, and nominate an appointee, then it became complete, and operated as a grant of the land, for that chattel interest, to take effect out of his remainder in tail, from that time; that the meaning was to leave it in the uncle's power, or option, to make

use of it or not; and that the next consideration was, supposing this was not such an interest as could take effect until the power was executed, and that without particular appointment the executors of the testator could have no benefit, whether this differs from the other cases on the execution of general powers, when executed by the party, as *Shirley v. Lord Ferrers*, and others. And then follow the remarks first cited. He is reported to have said, subsequently, in the same case: "Here the testator had a power to appoint the benefit of the covenant, or in the other light this chattel interest in the land, to take effect out of the remainder in tail, generally to any person, or to take it to himself; he appoints it not to himself, but merely voluntarily to a daughter, to take effect after his death, as it could not be otherwise; in respect of his creditors it must be considered as part of his estate at the time of his death; he having executed so as to gain the interest to himself, and attempted to pass it at the same time to his daughter, the court will not suffer it, saying he has been guilty of a fraud as to them, being indebted at the time." Perhaps there may be some error in the language of this part of the report, as it is clear, not only from the statement of the case, but from other parts of the opinion, that there was nothing that the testator could take to himself, into his own possession, in his life-time, or that any one could take through him, except upon his appointment, to take effect after his decease. If the language quoted was used, Lord Hardwicke, by the words, "take it to himself," could only have intended that he might appoint it to such use after his decease as he should by some other instrument direct, which would not affect the principle of the case.

The decision was in favor of the creditors, and the case is therefore a direct authority against the objection urged in behalf of the defendant, for the reason before stated, that it shows that it is not essential, in order to constitute a general power, that the party should have the right to make a disposition which will take effect immediately, or even one through which he may receive anything to his own use, in his life-time. A power, then, is general or not, within the meaning of the rule, according to the persons or uses to which the property may be appointed under it, and not according to the time when its exercise takes effect in possession, or the instrument by which its exercise is to be manifested.

We are satisfied that if the principle is once admitted, it must lead to this result. To hold that creditors should come in where

the party had a power to dispose of the estate to whom he pleased, taking effect in his life-time, and that they were shut out if the power extended only to dispose of the estate as he pleased, taking effect at his decease, would be making a distinction without any sound difference, and we should come to such a conclusion only, upon finding that we were thus limited by the authorities. If a party may by will or deed dispose of property to whom and for such uses as he pleases, to take effect at his death, and may thus apply it to the payment of his debts, or direct any other disposition to be made of it, he has as great a power of disposal as he has over his own estate, to take effect at the same time; and having undertaken to exercise the authority, it may well be treated as a part of his estate, upon his decease, so far as to require that he should first provide for his debts out of it; and if he fails so to do, equity may apply it as a part of his estate, so far as it is necessary for that purpose. Undertaking to exercise a power, which authorized him to appropriate the property to the payment of his creditors by a mere gift or legacy, without making provision for them, is a fraud upon them. It is no answer to this to say, that the property is a part of the estate of Jacob Sheafe, and that Theodore Sheafe had merely a right to designate what disposition should be made of it upon his decease. That unlimited right of disposition, with the act of Theodore in exercise of it, makes it part of his estate.

It but serves to confirm this view of the matter, in this particular case, that, by the will of Jacob Sheafe, if Theodore failed to act upon his power of appointment, the property was to be distributed, on the decease of Theodore, among Theodore's heirs at law. That, however, would not have authorized the creditors to interfere with it, had Theodore declined to exert his power over it, as it would then have passed to his heirs by the will of Jacob Sheafe alone, and they would have taken as legatees under the will. If, on account of the phraseology to which we have adverted, in the case of *Lord Townshend v. Windham*, 2 Ves. sen. 1, any further authority is desirable in support of the principle which we have deduced from that case, relative to the construction of the term, "general power," it may be found in *Jenney et al. v. Andrews et al.*, 6 Madd. Ch. 264, in which it was held, that where a party, having a power of appointment over money, to be executed only by will, made his will, disposing of the property, and then became bankrupt, and afterwards obtained his certificate, and died without revoking

his will, the appointee by the will was a trustee for the creditors of the bankrupt, who became such after he had obtained his certificate.

The facts of the case were, that by a settlement in April, 1808, made previously to the marriage of Henry Humphries, and Jane his wife, a moiety of five thousand nine hundred and ninety-nine pounds twelve shillings and ninepence three per cents became vested in trusts, for such uses (if there should be no children of the marriage), as Henry Humphries should by his last will and testament in writing, or any writing in the nature of a will, or any codicil or codicils executed by him in the presence of and attested by two or more credible witnesses, direct, limit, or appoint, and for want of such direction, limitation, and appointment, in trust, for the plaintiff, Jane Humphries, her executors and administrators. Henry Humphries being indebted to the plaintiff, Edward Jenney, in the sum of four thousand five hundred pounds, assigned or appointed his interest to Jenney, by indenture, the twenty-first of August, 1815, as a security for the debt. On the fifteenth of November, 1815, a commission of bankruptcy issued against Henry Humphries; the defendants Taddy and Tullock and Newman were chosen assignees; and Andrews and the plaintiff Jenney, the trustees under the settlement, proved a debt under the commission, on account of a bond given to them by the bankrupt, for securing a sum of money, as part of the trust funds of the marriage settlement; and received a dividend which was added to the trust property, a moiety of which the bankrupt had power to appoint by his will.

Henry Humphries, in order more effectually to secure Jenney, on the twenty-ninth of August, 1815, made his will in the presence of two witnesses, and thereby appointed his interest in the trust moneys to Jenney, his executors, administrators, and assigns, in trust, to raise the said sum of four thousand five hundred pounds, and interest, and subject thereto, in trust for the plaintiff, Jane Humphries. Henry Humphries died on the tenth of May, 1820, without issue, having previously obtained his certificate, and Jane Humphries, the plaintiff, proved the will. The plaintiff, Jane Humphries, claimed the absolute interest in the money, and the prayer of the bill was accordingly. On the other hand, the assignees of Humphries, the husband, claimed the money. The counsel for the plaintiffs contended that the bankrupt had a power of disposal only by will, and that the property appointed could not, therefore, be assets till after

his death. But as the bankrupt obtained his certificate, this property, acquired subsequently, could not pass to the assignees. The vice-chancellor said, "where there is a general power of appointment by will, and an appointment is made, the appointee is a trustee for creditors; but it is not for creditors at the time of the execution of the will, but at the death of the testator. The certificate of the bankrupt deprives the assignees of all claims for the benefit of the creditors under the commission."

The power of appointment in the above case could be exercised by will only, which of course could not take effect until after the decease of the party appointing; but no doubt is expressed on that account, and it was regarded as a general power. And in *Townshend v. Windham*, the power was to be executed, as in this case, by deed or will. See also *Tomlinson v. Dighton*, 1 P. Wms. 149, 171; *Green v. Spicer*, 1 Taml. 396. Upon these authorities we are of opinion that the power given to Theodore Sheafe was a general power, within the meaning of the rule. It enabled him to treat the subject-matter of it as his property, at his decease. He assumed in virtue of the power to make a disposition of it, to take effect at that time, as if he had the ownership, and the court must thereupon treat it as if it was his property, so far as to subject it to the discharge of his debts.

Demurrer overruled. Leave to file an answer.

POWER OF APPOINTMENT, INTEREST OF DONEE IN.—A power of appointment is not an absolute right of property: *Holmes v. Coghill*, 7 Ves. 506. It is not an estate, and has none of the elements of an estate: *Burleigh v. Clough*, 52 N. H. 267. It is merely "an authority enabling a person through the medium of the statute of uses to dispose of an interest in real property vested either in himself or in another person:" Bouvier's Law Dict.; 4 Kent's Com. 316; *Goodill v. Brigham*, 1 Bos. & Pul. 197, per Buller, J. Indeed, a technical power is so inconsistent with absolute ownership that they can not co-exist. The principle is very well stated by Parker, C. J., in *Eaton v. Straw*, 18 N. H. 320, as follows: "A general power of disposition does not necessarily imply ownership. In fact, the existence of such a power, as a technical power, excludes the idea of an absolute fee simple in the party who possesses the power. The absolute fee simple including and involving the power of disposition, no technical power as a mere power could exist in the same party, separate from and independent of it. It would be preposterous for the owner of an absolute estate in fee simple to make a conveyance of his estate, under a technical power over it, even if the language in the constitution of a power as usually expressed were superadded to the conveyance in fee by which he took his estate." As a power of appointment is not an estate, so it does not enlarge an estate upon which it is engrafted. Therefore, where an estate is given for life only, though a general power of appointment is annexed, it does not convert the estate into a fee, but the donee takes only a life estate, unless there is some manifest general intent to the contrary in the instrument creating the power: 4 Kent's Com. 319; *Pulliam v. Byrd*, 2 Strob. Eq. 134; *Ben-*

tham v. Smith, 34 Am. Dec. 599; *Burleigh v. Clough*, 52 N. H. 287. See also *Livingston v. Murray*, 68 N. Y. 485. "The estate limited being express and certain, the power is a distinct gift, and comes in by way of addition:" *Tomlinson v. Dighton*, 1 P. Wms. 171. The power must be exercised in such a case to dispose of the inheritance: *Pulliam v. Byrd*, 2 Strob. Eq. 134. And where a testator gives a life estate, with a general power of appointment of the inheritance, and in case of a failure to appoint, gives the estate to other parties, the latter take a vested remainder subject to be defeated by the exercise of the power, and not an executory devise: *Burleigh v. Clough*, 52 N. H. 287; *Williman v. Holmes*, 4 Rich. Eq. 475. But where a devise is made to one without limitation, with a general power of disposition, the donee takes a fee: *Smith v. Starr*, 31 Am. Dec. 498. And even where a life estate is given by will with a general power of disposition annexed, it will be construed a fee, if such appears by the will to have been the intention: *Shermer v. Shermer*, 1 Am. Dec. 460, and cases cited in the note.

UNEXECUTED POWER OF APPOINTMENT VESTS NO INTEREST in the donee, whether annexed to a particular estate or not. This follows from what has already been said. An unexecuted power of appointment, therefore, is not assets for the payment of debts of a deceased donee: *Harrison v. Battle*, 1 Dev. & Bat. Eq. 213. If a general power given by will is annexed to a life estate with remainder over in case of failure to appoint, the remainder-man of course takes upon the non-execution of the power: *Benham v. Smith*, 34 Am. Dec. 599. If there is no remainder over, the unappointed residue reverts to the donor or his heirs or representatives, and he is regarded as dying intestate to that extent: *Pulliam v. Byrd*, 2 Strob. Eq. 134; *Harrison v. Battle*, 1 Dev. & Bat. Eq. 213; *Frasier v. Frasier*, 2 Leigh, 642.

EXECUTION OF GENERAL POWER OF APPOINTMENT CONVERTS THE ESTATE INTO ASSETS in equity for the payment of debts, and the claims of creditors have a preference over those of the appointee. This doctrine is "thoroughly well established by a long and unbroken line of decisions in England and in this country," though there have been "occasional protests against the refinement and subtlety of the rule: *Cutting v. Cutting*, 20 Hun, 360; *Tallmadge v. Sill*, 21 Barb. 34; *Harrison v. Battle*, 1 Dev. & Bat. Eq. 213; *Harrington v. Hart*, 1 Cox's Ch. 131; *Jenney v. Andrews*, 6 Madd. 264; *Fleming v. Buchanan*, 3 De G. M. & G. 976; *Vaughan v. Vanderstegen*, 2 Drew. 165; *Shattock v. Shattock*, L. R., 2 Eq. 187; 1 Story's Eq. Jur., sec. 176, note; 2 Sug. on Powers, 28, 29; 2 Wms. Ex. 1685, 1686, 6th Am. ed., marg. pages. And though equity will not execute a non-executed general power in favor of creditors, it will aid a defective execution: 1 Story's Eq. Jur., sec. 176, note; 2 Pom. Eq., sec. 834. It is only, however, as against volunteers that creditors have this preference, and a bona fide purchaser under a voluntary appointee will be protected: *George v. Milbanke*, 9 Ves. 190; *Hart v. Middlehurst*, 3 Atk. 377. Children of the donee taking as appointees are deemed volunteers, although the estate is limited to them by the terms of the will or settlement in case of a failure to appoint: *Vaughan v. Vanderstegen*, 2 Drew. 178.

Where property is settled to the separate use of a married woman for life, with a general power to appoint the reversion by deed or will, her execution of the power does not subject the property to payment of her debts, because the power is not separate estate, nor does the estate become so when appointed, and even if it were separate estate, it is not liable for the payment of debts generally where there is nothing from which an intent to charge the separate estate can be inferred: *Vaughan v. Vanderstegen*, Id. 165; *Shattock v. Shattock*, L. R., 2 Eq. 182. But if she contracts debts fraudulently by representing

herself to be *sole*, it seems, that equity will regard her as *sole* for the purpose of subjecting an estate appointed by her under a general appointment for the payment of those debts: *Vaughan v. Vanderstegen*, 2 Drew. 363. It is to be noted that in order to subject an appointed estate to the claims of creditors of the appointor, the power of appointment must be general and not special, as stated in the principal case. A general power is a power to appoint whomsoever the donee pleases, while a special or particular power is one by which the right is limited to particular objects: *Thompson v. Garwood*, 31 Am. Dec. 502. But a general power to be executed by will is just as effectual for the purpose of subjecting the appointed estate to payment of the appointor's debts as a power to appoint by deed: *Tallmadge v. Sill*, 21 Barb. 34; *Jenney v. Andrews*, 6 Madd. 264; *Vaughan v. Vanderstegen*, 2 Drew. 176. Under the New York revised statutes it is held that where a testatrix devised property to her executors in trust, to apply the rents and profits to the use of her son for life, and after his death to convey to such persons as he should appoint by will, and he made an appointment and died, the real estate was not subject to payment of certain judgments recovered against him, but the personalty was, on the ground that the equitable rule before referred to was abolished as to realty but not as to personalty: *Cutting v. Cutting*, 20 Hun. 361, commenting on and explaining the provisions of the statute relating to powers: 1 N. Y. R. S. 732, sec. 79 *et seq.* See also, for a statement of the effect of those provisions, 4 Kent's Com. 320, 321, 326-328, 331, 341.

BELL v. SCAMMON.

[15 NEW HAMPSHIRE, 381.]

FEE PASSES BY DEVISE ON CONDITION THAT DEVISEE SHALL PAY DEBTS of the testator.

FEE PASSES BY DEVISE OF "ALL THE ESTATE," real and personal, of the testator.

LIMITATION OVER UPON INDEFINITE FAILURE OF ISSUE of the first taker is void as an executory devise, because too remote.

LIMITATION OVER UPON FAILURE OF ISSUE RESTRAINED TO ISSUE LIVING at the death of the first taker, is a good executory devise; as where there is a limitation over if the first taker "should die before he arrives to the age of twenty-seven years and have no male issue," and part of the estate limited over is given to the "heirs" of such taker.

SOURCE FROM WHICH ESTATE WAS DERIVED IS NOT RECORDED in New Hampshire in determining who shall inherit it, unless the statute makes that fact material.

DESCENT OF ESTATE OF DECEDENT IS GOVERNED BY STATUTE EXISTING at his death, and a statute regulating the descent of a "deceased child's share in the estate" of a decedent will not govern the descent of property taken by a child under his father's will, where the father died before the statute and the child afterwards, but the child will be regarded as a new stock of descent.

FREEHOLD ESTATE IN FUTURO WILL PASS BY DEED of bargain and sale or a covenant to stand seised.

PECUNIARY CONSIDERATION, HOWEVER SMALL, WILL SUPPORT DEED of bargain and sale.

CONVEYANCE TO SON-IN-LAW IS GOOD AS COVENANT TO STAND SEISED, where the consideration expressed is "the love and good will I bear D. L. as my son-in-law," though the grantor's daughter, wife of the grantee, and the only child of such daughter are both dead at the date of the deed.

WRIT of entry to recover certain land. Both parties claimed under the will of Hezekiah Scammon, the material provisions of which are stated in the opinion. The testator died in 1817, leaving a widow, Leah Scammon, who died in 1838, and three children: James Scammon, who died in 1819, at the age of twenty-one, leaving one daughter, Jane, now the wife of Bickford, one of the tenants; Comfort Scammon, who intermarried with David Lang, and died in 1823, leaving a son, James, who died in 1825; and Melinda, who died under age, and unmarried, in 1826. The demandant claimed under Benjamin Lang, grantee of David Lang, to whom Leah Scammon conveyed in 1828 by a deed, sufficiently described in the opinion. John Scammon, one of the tenants, claimed under a deed from Bickford and wife, and also claimed a certain undivided interest under a levy of execution against David Lang.

James Bell, for the demandant.

Christie, for the tenants.

By Court, GILCHRIST, J. A series of judicial decisions extending through a long period of years, has settled the principles by which this case must be governed and the rules by which the will must be construed, the application of which is not very difficult. The testator devises to his wife "the improvement and income of two thirds of all his lands so long as she remains his widow." She then holds two thirds of the lands during her widowhood. He then devises to James Scammon, "his heirs and assigns, my workshop, with the land it stands on." This is an express devise in fee, unconnected with and independent of any condition attached to the subsequent devise. He then proceeds: "Also I give him the improvement of all my real estate not otherwise disposed of in this will, during the term of his mother's widowhood." The estate "not otherwise disposed of" was one third part of the testator's lands. He had given Mrs. Scammon the use of two thirds of his lands during her widowhood, and deducting the workshop and the land it stood upon, James would hold the remaining third during his mother's widowhood. Thus all his lands were disposed of so long as Mrs. Scammon should remain his widow. Thus far the will is free from any doubt.

The next provision is the material one, and is that about which the controversy has arisen. It is as follows: "I also give and bequeath to him (James), his heirs and assigns, all my real and personal estate not otherwise disposed of in this will, he to come into possession at the decease or marriage of my wife, on condition of his paying all my just debts and the legacies herein ordered to be paid; but if my said son James should die before he arrives to the age of twenty-seven years, and have no male issue, then it is my will that each of my daughters should have one third part of my real estate, and his heirs the other third part." In this provision there are several clauses which require consideration. James was to come into possession of the estate then undisposed of, at the death or marriage of Mrs. Scammon. The possession refers to Mrs. Scammon's two thirds, as he already had possession of one third. These words are referred to here for the purpose of remarking that they convey no future interest, the estate having already been devised to him by the words preceding those which refer to the possession.

But this remainder in fee is devised to him "on condition of his paying all my just debts and the legacies herein ordered to be paid." Now a fee is conveyed to James Scammon by this devise in three different modes. In the first place, the property is conveyed to "him and his heirs." It needs no authorities at this day to show that these words convey the fee. Where there are no words of limitation, courts resort to other parts of the will in order to ascertain from them the intention of the testator, and a fee is often held to be conveyed by implication, but this is done only to supply defects of expression: *Stevens v. Winship*, 1 Pick. 326 [11 Am. Dec. 178]; *Lithgow v. Kavenagh*, 9 Mass. 165; *Doe v. Fyldes*, Cowp. 841; *Tanner v. Livingston*, 12 Wend. 95. Where a fee is devised by express terms, it is unnecessary to imply it. In the present case, there is a personal charge upon the devisee, and for that reason also he takes the fee: 4 Kent, 540; *Doe v. Holmes*, 8 T. R. 1; *Van Alstyne v. Spraker*, 13 Wend. 578; *Fox v. Phelps*, 17 Id. 393; *Jackson v. Bull*, 10 Johns. 148 [6 Am. Dec. 321]. The reason for this is, that if the devisee did not take a fee, he might be a loser by paying the debts, and the testator is presumed to intend that his gift shall be beneficial to the devisee: *Leavitt v. Wooster*, 14 N. H. 550. A fee is also conveyed, because the testator has devised all his estate, and this expression is sufficient without words of limitation: *Fogg v. Clark*, 1 Id. 163; *Brown v. Wood*, 17 Mass. 68;

Randall v. Tuchin, 6 Taunt. 410; *Cliffe v. Gibbons*, 2 Ld. Raym. 1324; *Grayson v. Atkinson*, 1 Wils. 333; *Hopewell v. Ackland*, 1 Salk. 239; *Doe v. Allen*, 8 T. R. 503; *Leavitt v. Wooster*, 14 N. H. 550.

The next inquiry relates to the effect of the limitation over to the daughters after the devise to James in fee. The will provides that "if he should die before he arrives to the age of twenty-seven years, and have no male issue," then each of the daughters should have one third of the real estate. In the construction of this limitation, the intention of the testator is undoubtedly, as has often been said, the pole star by which the court is to be guided. "Notwithstanding, there has been for ages a system of legal construction established on the subject of devises, by which when a certain form of words is used a construction is put upon that form, and adhered to for the sake of certainty:" Lord Mansfield, *Pistol ex dem. Riccardson v. Riccardson*, 3 Doug. 361; Parsons, C. J., *Ide v. Ide*, 5 Mass. 501; Lord Kenyon, *Doe v. Wright*, 8 T. R. 64.

There are numerous authorities that where there is a devise to a man and his heirs, but if he should die without issue, or having no issue, or leaving no issue, then over, that the first devisee takes an estate tail, with a contingent remainder to the subsequent devisee. The words, without issue, etc., have been construed to mean an indefinite failure of issue, and the remainder over has been held void as an executory devise, because too remote, as tending to a perpetuity, for the descendants of the first taker might not become extinct for hundreds of years: See 4 Kent, 274; *Ide v. Ide*, 5 Mass. 500; *Patterson v. Ellis*, 11 Wend. 259; *Doe v. Ellis*, 9 East, 382; *Romilly v. James*, 6 Taunt. 263; *Tenney v. Agar*, 12 East, 253; *Purefoy v. Rogers*, 2 Saund. 380; *Doe v. Morgan*, 3 T. R. 765. But see also *Hall v. Chaffee*, 14 N. H. 215. If the words importing a failure of issue are restrained to issue living at the death of the first taker, there is no question that the limitation over is good as an executory devise. One class of cases in which the words are clearly thus restrained, is where the death of the first devisee is confined to a given age; as is the case with this devisee, James Scammon, the limitation over being if he "should die before he arrives to the age of twenty-seven years, and have no male issue:" *Eastman v. Baker*, 1 Taunt. 174; *Tbovey v. Bassett*, 10 East, 460; *Glover v. Monckton*, 3 Bing. 15.

On another ground, also, the limitation over is valid. The expressions in the will show that the testator intended that the words, "have no male issue," should refer to the state of things

existing at the death of the devisee. If he should die without such issue, his heirs are to take one third part of the lands. Who his heirs might be must be determined upon his death. That, then, is the period to which the testator refers. It might indeed be said that the period for ascertaining who his heirs might be, was after all his descendants should become extinct. But this is not so obvious or so rational an exposition of the will as the other construction; for in order to adopt it, we must disregard the first class of heirs entirely, and the first period when the devisee can be said to have heirs, in a legal sense, although they answer all the requirements of the will. We think the testator intended the death of James Scammon, without issue living at the time of his death, and that the limitation over to the daughters is valid by way of executory devise. Upon the death of James Scammon, his daughter Jane, the wife of the tenant, took a fee in the property devised to her father, by the operation of the rule in *Shelley's Case*, a freehold estate having been given him by the will, and the words, "his heirs," being words of descent and not words of purchase. This share the tenant now holds in her right. Comfort Scammon having married David Lang, her share descended upon her death to her son James, and at his death after his mother, it was inherited by his father, David Lang, as his next of kin, and the demandant now holds it by virtue of a conveyance from Lang.

A question is made in the case as to the share of Melinda. She died under age, and unmarried, in the month of December, 1826. In order to ascertain who inherited her property, it will be necessary to examine our statutes regulating descent. By the act of July 2, 1822, N. H. L. 351, ed. of 1830, it was provided, that an intestate estate should descend in equal shares among the children and their representatives, and if there were no children it should be inherited equally by the next of kin; provided, however, that when any of the children of such intestate should die before the age of twenty-one years, and unmarried, or when any child of a person deceased testate should die before twenty-one years of age, and unmarried, such deceased child's share in the estate should, although its other parent be alive, be inherited by its surviving brothers and sisters, etc. The act of February 3, 1789, N. H. L. 207, ed. of 1815, contains no provision relating to the descent of a deceased child's share in a testate estate. This act was in force in the year 1817, when James Scammon died. It permitted an estate to be disposed of according to the will of the tes-

tator, but it did not prescribe the disposition of a share which a devisee might take under a will. Upon the death of her brother James, in 1819, Melinda took under the will by way of executory devise. If the act of 1789 had remained in force, the share or property of Melinda would not have been disposed of upon her death as a share in her father's estate, but would have gone as her estate to her next of kin. The fact that she derived her estate from her father would have no more effect upon its descent as her property, than its derivation from any other source, the will of a stranger for instance. In this state we never look to the source whence the estate was derived, to determine who shall inherit it, except in cases where the statute has made that circumstance material, and it is not made so in this instance: *Parker v. Nims*, 2 N. H. 461. Melinda took as a purchaser under the will, and would have become a new stock of descent.

The act of 1822 had no retrospective operation so as to regulate the disposition of Hezekiah Scammon's estate, for that estate had already been settled, and all the provisions of the will had been carried into effect before the passage of the act. The provisions of the statute had no relation to what once was, but which no longer remained, a share in the estate. Melinda's property had ceased to possess that quality, and was simply her property, her interest in the land as an executory devisee. Then being a purchaser, her property was not in a condition to be operated upon by the provision relative to shares in testate estates. The general provisions of the act of 1822, regulating the descent of intestate estates, furnished the rule for the disposition of her property at her death in 1826, she being the stirps. These provisions gave to the next of kin, precisely as the act of 1789 would have done, and her mother, as next of kin, took all her property by the operation of the general rule laid down in the statute, the case not falling within any of the exceptions: *McAfee v. Gilmore*, 4 N. H. 391.

Melinda's property having thus been inherited by her mother, Mrs. Scammon, the latter conveyed all her interest in the estate to David Lang, in the month of February, 1828. The deed contained the following clause, "He, the said Lang, to take full possession at my marriage or death," and was in consideration of "one dollar and the love and good-will I bear David Lang, as my son-in-law." It was contended that this deed is void, as attempting to convey a freehold estate *in futuro*. The deed undoubtedly reserves an estate to the grantor during her life.

This is its obvious construction, and the remainder after the expiration of the life estate is all that the grantee took by the deed. There seems to be no reason why it may not operate under the statute of uses, both as a deed of bargain and sale, and as a covenant to stand seised to the use of the grantee, by either of which modes a freehold *in futuro* will pass. In neither of them are any formal words required. So long ago as the time of Levinz it was said, "that the judges of late years have had more consideration of the substance, viz., the passing of the estate, than the shadow, viz., the manner of passing it:" 3 Lev. 372. There is a pecuniary consideration, which, however small, is sufficient in a deed of bargain and sale. The New York decisions have settled there that this deed will pass a freehold *in futuro*: *Jackson v. Staats*, 11 Johns. 337 [6 Am. Dec. 376¹]; *Jackson v. Swart*, 20 Id. 85; *Jackson v. McKenny*, 3 Wend. 233 [20 Am. Dec. 690]; *Rogers v. Eagle Fire Co.*, 9 Id. 611. And in two recent very acute and learned English treatises, Cornish on Uses, 44, and Burton on Real Prop., pl. 145, it is stated, and the authorities are cited, that a deed of bargain and sale will convey a freehold *in futuro*. In the case of *Wallis v. Wallis*, 4 Mass. 136 [3 Am. Dec. 210], it is said that "by a common law conveyance a freehold can not be conveyed *in futuro*," but no reference is made to the fact that a deed of bargain and sale derives its effect from the statute of uses. In the case of *Welsh v. Foster*, 12 Id. 96, it is held, that such a deed will not pass a freehold *in futuro*, and also in *Parker v. Nichols*, 7 Pick. 115. In this case it is said by Mr. Justice Jackson, that the statute of uses, 27 Hen. VIII., had not been adopted in Massachusetts. It has, however, been adopted in this state: *Chamberlain v. Crane*, 1 N. H. 64; *New Parish in Exeter v. Odiorne*, Id. 237; *French v. French*, 3 Id. 234. The point is, however, so learnedly reasoned out by Mr. Chancellor Walworth, in the case of *Rogers v. Eagle Fire Co.*, 9 Wend. 625, 631, and the authorities so fully examined, showing that a freehold estate *in futuro* may be thus conveyed, that the references above made in our opinion authorize the position that the deed in this case has that operation.

Whether the deed can operate as a covenant to stand seised depends on the question whether the consideration be sufficient. If it can operate as such a covenant, it will convey a freehold *in futuro*, upon all the authorities. The consideration is "the love and good will I bear David Lang as my son-in-law." James, the son of Comfort and David Lang, and the grandson of Mrs. Scam-

mon, had died before the date of this deed. There was no actual relationship then existing between Lang and Mrs. Scammon, but he had been the husband of the grantor's daughter, and the father of her grandson, both of whom were then dead. In the case of *Gale v. Coburn*, 18 Pick. 397, the daughter of a grantor had married the grantee, but died before the date of the deed, leaving, however, two children, who were then living. A doubt was suggested whether, after the death of the wife, the consideration of marriage could be regarded as still subsisting. But it was unnecessary to decide the point, because there was a consanguinity between the grantor and his grandchildren, and Shaw, C. J., said that "the grantor might well suppose that the most effectual mode of advancing his grandchildren was to vest the property in one, bound by every consideration of legal obligation, moral duty, and parental affection, to provide for their maintenance, education, and advancement."

If the above be a sufficient reason for holding the consideration to be sufficient, and the boundaries which exclude persons as too remote to be within its influence have never yet been defined, the consideration may be sufficient in the present case. That the grantee had been the husband and father of those nearly allied to her by ties of blood, and had bestowed on them the kindness and care which they would naturally call forth and require, would appeal as strongly to the feelings of the grantor as would the expectation of advantage to the grandchildren of the grantor in the case of *Gale v. Coburn*. And there is good authority for going as far as this case requires. In *Shep. Touch.* 511, 512, it is said that if one, "in consideration of nature, kindred, blood, or marriage, covenant to stand seised to the use of himself, his wife, or intended wife, children, brothers, sisters, cousins, or their wives, or intended wives, these are good considerations." If the intended wife of a man's cousin come within the consideration of marriage, the husband of a deceased daughter would seem to be equally so, and in the absence of any authorities to the contrary we think the consideration in this case is sufficient.

David Lang having thus acquired a title to the property devised to Melinda, conveyed it to Benjamin Lang, who conveyed it to the demandant, and the latter is entitled to judgment for two thirds of the land, with the exception of the tract levied upon by John Scammon, as stated in the case, in relation to which no question is made.

Judgment for the demandant.

FREE PASSES BY WILL, WHEN: See *Everts v. Chittendon*, 2 Am. Dec. 97; *Holmes v. Williams*, 1 Id. 49; *Jackson v. Merrill*, 5 Id. 213; *Jackson v. Delancy*, 7 Id. 403; *Cassell v. Cooke*, 11 Id. 610; *Lindsay v. McCormack*, 12 Id. 387; *Jenkins v. Clement*, 14 Id. 698; *Peyton v. Smith*, 17 Id. 758; *Harper v. Blean*, 27 Id. 367; *Godfrey v. Humphrey*, 29 Id. 621; *Ware's Ex'rs v. Murph*, 33 Id. 97. See also the note to *Tolar v. Tolar*, 14 Id. 576. That a devise subject to a charge passes a fee, see *Jackson v. Merrill*, 5 Id. 213; *Lindsay v. McCormack*, 12 Id. 387, and the notes to those cases. That a devise subject to a charge carries a fee, is held, citing the principal case, in *Lummas v. Mitchell*, 34 N. H. 47.

LIMITATION OVER ON FAILURE OF ISSUE, when valid as executory devise, and when not: See *Richardson v. Noyes*, 3 Am. Dec. 24; *Jackson v. Blanshan*, Id. 485; *Feedick v. Cornell*, Id. 340; *Cudworth v. Thompson*, 4 Id. 617; *Hawley v. Northampton*, 5 Id. 66; *Jackson v. Staats*, 6 Id. 376; *Anderson v. Jackson*, 8 Id. 330; *Rogers v. Ross*, Id. 575; *Dethl v. King*, 9 Id. 407; *Sayward v. Sayward*, 22 Id. 191; *Lewis v. Claiborne*, 26 Id. 270, and notes thereto.

CONVEYANCE OF ESTATE TO TAKE EFFECT IN FUTURO: See *Jackson v. McKenny*, 20 Am. Dec. 690, and note; *Barrett v. French*, 6 Id. 241. The principal case is cited and approved on the point that a freehold to commence *in futuro* may be conveyed by deed of bargain and sale or by covenant to stand seised, in *Wyman v. Brown*, 50 Me. 153; *Cook v. Brown*, 34 N. H. 477; *Dennett v. Dennett*, 40 Id. 499, 500; *Caulk v. Fox*, 13 Fla. 160; *Wardwell v. Bassett*, 8 R. I. 305.

COVENANT TO STAND SEISED, DEED, GOOD AS, WHEN: See *Van Horn v. Harrison*, 1 Am. Dec. 229; *Cheney v. Watkins*, 2 Id. 530; *Wallis v. Wallis*, 3 Id. 210; *Barrett v. French*, 6 Id. 241; *Jackson v. Staats*, Id. 376; *Jackson v. Sebring*, 8 Id. 357; *Jackson v. McKenny*, 20 Id. 690. In *Trafton v. Hawes*, 102 Mass. 537, the case of *Bell v. Scammon* is cited as showing that the decisions in New Hampshire follow those of New York in holding a consideration of blood or marriage essential to support a covenant to stand seised. So it is cited as holding that the validity of the consideration of marriage is not limited to cases of contemplated marriage with the covenantor's kindred: *Thompson v. Thompson*, 17 Ohio St. 657; S. C. in court below, 6 Am. L. Reg. (N. S.) 29. In *Thornton v. Mulquhane*, 12 Iowa, 559; *Wardwell v. Bassett*, 8 R. I. 305, it is held, on the authority of *Bell v. Scammon*, as a strictly analogous case, that a conveyance to a daughter-in-law having no issue, in consideration of love and affection, is good as a covenant to stand seised.

STOWELL v. READ.

[16 NEW HAMPSHIRE, 20.]

MONEY TENDERED IN PAYMENT OF A DEBT does not, unless accepted, discharge the debtor, or vest title to the same in the creditor.

TENDER IN PAYMENT OF A DEBT PREVENTS THE RECOVERY OF COSTS in an action to enforce the demand.

FOREIGN attachment. The opinion states the facts.

By Court, Woods, J. By c. 208, sec. 8, of the revised statutes, "Every person summoned as a trustee, having in his possession any money, goods, chattels, rights, or credits of the principal

defendant at the time of the service of the writ upon him, or after the service and before his disclosure, shall be adjudged a trustee therefor." And, by section 23, it appears that a corporation may be held by the trustee process in the same manner. It appears that the trustee in the present suit had been made by the defendant the depository of a sum of money in specie, which he said had been tendered by him to one Burnham, and which he desired might be delivered to Burnham, if he should call for it and conform to certain conditions. The representations of the defendant tending to establish in another some right to the money, which, by presumption arising from possession, would be held to be his own, may be taken to be true; and the question arising upon the facts represented by him is, whether the money was his or Burnham's.

When money is tendered in payment of a supposed debt or liability, the party to whom the tender is made may or may not, at his option, accept the money. If he accept it, he of course becomes the owner of it. If he declines it, the consequence is, that when he afterwards demands it, the debtor must be ready to pay it, or else what has been done is of no avail at all. If, however, he does not demand the money, but brings an action upon the debt or obligation on which it is due, the party owing it may bring it into court and plead the facts, and so avoid the costs that would otherwise arise in the action. The tender does not discharge the debt, for an action lies as well after the tender as before to enforce the payment of it; and the creditor can not maintain trover for the money that has been tendered and not accepted. On the contrary, the debtor may, from the moment it is refused, appropriate it to his own use. Indeed, the only effect of a tender is, to enable a debtor who has made it, and keeps it ready for the creditor, to escape the payment of the costs of any action that may be commenced to recover the debt, by showing that he has done, and is ready to do, all that is in his power to perform his contract, and that, although the debt is not paid, it is no fault of his. The tender operates only as a shield against the costs of litigation. The money, therefore, deposited by the defendant, was his, notwithstanding it had been tendered to another and refused. The trustee must therefore be charged.

Trustee charged.

TENDER, EFFECT OF AND ESSENTIALS TO: See the notes to *Behaly v. Hatch*, 12 Am. Dec. 570; *Barney v. Bliss*, Id. 696; *Brown v. Gilmore*, 22 Id. 223; *Lamb v. Lathrop*, 27 Id. 174.

EXETER BANK v. STOWELL.

[16 NEW HAMPSHIRE, 61.]

PAROL EVIDENCE IS INADMISSIBLE TO SHOW that of those who signed a promissory note as principals, some were merely sureties for the others.

ASSUMPT. Evidence was offered and rejected that all the defendants, except Stowell, signed the note as sureties, and as such were discharged by an agreement between the plaintiff and Stowell extending the time of payment. The further facts appear in the opinion.

Bartlett, for the plaintiff.

Bell, for the defendants.

By Court, Woods, J. The only question arising upon this case is, whether the evidence offered is admissible for the purpose for which it was offered; and the proper determination of that depends upon the question, whether the effect of it would be to vary the written contract, or whether the proof that certain of the defendants were sureties and not principals would be consistent with the terms of an undertaking in which they describe themselves as being all principals. For no rule of law is better settled than that which precludes a party sued upon a contract which he has reduced to writing and signed, from introducing mere verbal proof that the contract that he really made was a different one, and so setting up the memory of man, for which the written memorial of the truth was designed as a substitute, to obliterate the record that he himself has made, and to demolish the monument that his own hands have erected to establish the evidence of what he had done. No authorities are required upon this elementary principle of evidence. In the note upon which the action is founded, the defendants say, "We jointly and severally all as principals promise;" that is, they promise as principals promise, and with the same legal effect. They bind themselves to do the same things that principals are bound to do, who sign a note for the payment of money. If the words were put there for any purpose whatever, it is plain that they were put there for the purpose of signifying a promise on the part of each who signed the note, that he would pay that note, notwithstanding events might occur which, but for those words, would have the legal effect of exonerating him from the duty of paying it.

Let us suppose for a moment that in point of fact all the parties but one were sureties, and the plaintiffs in taking the note so distinctly understood it. They promise, nevertheless, that

they will assume the duties and obligations of principals, and will claim none of the exemptions incident to the relation of suretyship. Would not the words "all as principals" have the effect of embodying such a stipulation in the contract? If so, then the contract as here written does without doubt carry a meaning other than that which would attach to it without those words. The conclusion then is not to be resisted or evaded, that evidence showing that they did not undertake as principals, but assumed only the more inferior obligations of sureties, would as plainly contradict the purport of the note, as if the defendants were to prove that it was twenty-five dollars instead of twenty-five hundred, that they had promised to pay. The evidence was properly rejected, and there must be

Judgment on the verdict.

PARTY TO NOTE MAY PROVE HIMSELF SURETY BY PAROL, WHEN: *Grafton Bank v. Kent*, 17 Am. Dec. 414, and note; *Stevens v. West*, 29 Id. 630; *Phelps v. Garrow*, 35 Id. 688.

KITREDGE v. ELLIOTT.

[16 NEW HAMPSHIRE, 77.]

OWNER OF A DANGEROUS ANIMAL IS LIABLE for any damage caused by the same, after notice of one instance of similar misbehavior on the part of such animal.

DISPOSITIONS SENT TO A JURY, WHICH CONTAIN IMPROPER MATTER, will vitiate the verdict, unless the same are wholly immaterial, or were sent through mistake.

TRESPASS on the case, for injury done to plaintiff's sheep by the dog of defendant. It appeared that on a former occasion the dog had committed a similar injury, of which the defendant had notice. The further facts appear in the opinion.

Pillsbury, for the plaintiff.

French, for the defendant.

By Court, Woods, J. It can not be said that there was not evidence in this case upon which the jury might have found, that a single instance of killing a sheep by the defendant's dog had occurred, and had come to his knowledge before the event which is alleged as the foundation of the plaintiff's action. It, therefore, becomes a legitimate and necessary subject of inquiry, whether notice of one instance of such violence or misbehavior on the part of the animal, is sufficient to put the owner

or keeper of him upon his guard, and to render him answerable for any mischief of the same kind subsequently done by the dog. In *Rex v. Huggins*, 2 Ld. Raym. 1583, it is said, that "there are cases of murder when no act was done by the persons guilty; as the letting loose a wild beast, which the party knows to be mischievous, and he kills a man. The owner of the beast is guilty of murder. There is a difference between beasts that are *feros naturæ*, as lions and tigers, which a man must always keep up at his peril, and beasts that are *mansuetæ naturæ*, and break through the tameness of their nature, such as oxen and horses. In the latter case, an action lies if the owner had notice of the quality of the beast; in the former case, the action lies without such notice." Such is, without doubt, in general the law, and dogs are considered, in the cases which relate to the subject, as presumptively of the tamed or domesticated class of animals: Toml. L. Dict., tit. Dog. In *Brock v. Copeland*, 1 Esp. 203, Lord Kenyon ruled that a man had a right to keep a dog for the protection of his yard or his house; that the injury which this action was calculated to redress, was when the animal, known to be mischievous, was permitted to go at large, and the injury arose from the fault of the owner.

So, in *Vrooman v. Lawyer*, 18 Johns. 389, the court held, that if damage be done by any domestic animal kept for use or convenience, the owner is not liable to an action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief. So the only question is, whether a notice of one single act of mischief is sufficient to charge the owner with the consequences of subsequent acts of the same kind. In *Jenkins v. Turner*, 1 Ld. Raym. 109, in which the plaintiff declared that the defendant *scienter retinuit quendam aprum ad mordendum et percutiendum animalia consuetum*; which boar bit the mare of the plaintiff. The evidence was, that the boar had once bitten a child; and, although it was objected that the declaration should have pointed out what kind of animals the boar was used to bite; otherwise, by "*animalia*" might be intended frogs, etc., the biting of which would indicate no such ferocity as to put the owner upon his guard; yet it was held to be well enough after verdict. In the case of a dog, there might, it was said, be a question whether the word "*animalia*" would be sufficient; because it might have been intended of some such animals as they naturally bite, such as hares, cats, etc. In that case it was also said, that the owner of a dog accustomed to bite sheep, after

notice of the first mischief, ought to have destroyed or hindered him from doing any more hurt, and, therefore, shall be answerable keeping the dog, if he bite a horse.

In *Jones v. Perry*, 2 Esp. 482, which was an action on the case for keeping a mischievous dog, by which the plaintiff's child was bitten; it was held, that the report of the dog's having been before bitten by a mad dog, is evidence to go to the jury that the defendant knew that the dog was mischievous, and ought to be confined; particularly if the defendant, by tying the dog up, showed some knowledge or suspicion of the fact. In *Smith v. Pelah*, 2 Stra. 1264, the chief justice ruled, that if a dog had once bitten a man, and the owner, once having notice of it, keeps the dog, and lets him go about or lie at his door, an action will lie against him at the suit of a person who is bitten, though it happen by such person's treading upon the dog's toes; for it was owing to his not hanging the dog on the first notice, and the safety of the king's subjects ought not afterward to be endangered.

Sarch v. Blackburn, 4 Car. & P. 297, was an action for an injury done to the plaintiff's leg by the bite of a dog kept by the defendant. A witness who was called by the plaintiff, stated that he had been bitten by the dog in question about three years before, and the defendant, upon that occasion, applied some brandy to the leg. It was submitted by the defendant that there was no case to go to the jury. Tindal, C. J.: "I think that the evidence given by the witness, that the dog had bitten him before, is something to go to the jury. It launches the case." This case comes fully up to the one before us. *Blackman v. Simmons*, 3 Car. & P. 138, was for an injury received from a bull. It appeared that notice had been given to the defendant, that the bull had run furiously at a man. And it appeared, that while the defendant was in the act of purchasing him, he was warned of the mischievous propensity of the animal, and replied, that it would suit him all the better, as he wanted it to turn into a mead, where he was annoyed by people fishing. It was also proved, that upon a gentleman saying that he supposed he would not turn in the bull without giving notice to the public, the defendant's reply was, "Let him give notice himself." Best, C. J. (to the jury): "If you are satisfied upon the whole, that the injury occurred from the vicious nature of the bull, which the defendant knew, you will find your verdict for the plaintiff."

We think these cases sustain the proposition, that in order to charge a party for the mischief done by his disorderly animal,

it is not necessary that he have notice that the animal has frequently "broken through the tameness of his nature" into acts of aggression upon man, or upon other animals in the dominion and ownership of man. It is unnecessary to prove more than that the owner has good cause for supposing that the animal may so conduct. And a good cause for so supposing is, that the animal has been known in a single instance to throw off the habits of domesticity and tameness, and to put on a savage nature; and a jury may well conclude, from a single occurrence of the sort coming to the mind of a party, that he had that knowledge of the vicious nature of the animal that makes him liable in the eye of the law, for its subsequent acts of misbehavior. As to the other error assigned, it does not appear by whose procurement the deposition was suffered to go to the jury in the condition described in the case. The general rule laid down in *Shepherd v. Thompson* is, that where a party causes depositions to be sent to the jury which contain improper matter, he will forfeit his verdict if he gain one. But the evidence may have gone to the jury through mistake, or have been wholly immaterial: *Page v. Wheeler*, 5 N. H. 91; *Shepherd v. Thompson*, 4 Id. 213. It does not appear by the case, how the fact was. Nor is it important, since, for the first error, the judgment must be reversed.

Judgment reversed.

LIABILITY OF OWNER FOR INJURIES DONE BY FEROCIOUS ANIMALS: See *Augus v. Radin*, 8 Am. Dec. 626; *Hinckley v. Emerson*, 15 Id. 383; *Leomis v. Terry*, 31 Id. 306, and note.

CHADBOURNE v. SUMNER.

[16 NEW HAMPSHIRE, 129.]

RETENTION OF THE POSSESSION OF PROPERTY LEVIED UPON is essential to the continuance of an attachment lien, unless the property is receipted for.

PROPERTY ATTACHED MUST BE REMOVED, when such removal is necessary for the retention of possession, notwithstanding such removal will be attended with some inconvenience.

KNOWLEDGE THAT AN ATTACHMENT HAS BEEN LEVIED, will not prevent a subsequent attachment on the same property, if no possession be retained under the former.

SHERIFF'S RETURN TO A WRIT OF ATTACHMENT, as between the parties to the suit and their privies, is conclusive; but as to third persons it is simply *prima facie*. Such return may be given in evidence, although it appears that no judgment has been rendered in the action in which the attachment was issued.

TRESPASS. Plaintiff claimed under a prior attachment, and the defendant under an attachment sale subsequent to the first. It appeared that the property in dispute was left in the uncontrolled possession of the debtor under the prior attachment. The further facts appear in the opinion.

Young and Benton, for the plaintiff.

Wells and Bellows, for the defendant.

By Court, PARKER, C. J. The attachment of the plaintiff was lost because no possession was retained by him. It is the duty of the officer who makes an attachment to retain the possession of the property, if it is not receipted for: *Odiorne v. Colley*, 2 N. H. 66 [9 Am. Dec. 39]; *Dunklee v. Fales*, 5 Id. 528; *Young v. Walker*, 12 Id. 506. The rule is the same in other states where attachments on mesne process are allowed: *Sanderson v. Edwards*, 16 Pick. 144; *Nichols v. Patten*, 18 Me. 231 [36 Am. Dec. 713]. Cases may exist in which it is his duty to attempt to procure a receiptor, or to secure the property in the place where it is found: *Barrett v. White*, 3 N. H. 210 [14 Am. Dec. 352]. But if this can not be done, and a removal is necessary in order that he may retain possession, it is the duty of the officer to remove it, and the fact that the removal will be attended with some inconvenience, does not furnish an excuse for a neglect to retain the possession. In this case no receiptor was procured. No person was placed in custody of it. There was not even an agreement of the debtor that it might remain in the barn without interference, if that with the posting of notices might have been sufficient. The plaintiff retained no custody of the property in any way. On this state of the facts the defendant might well attach the property. He had no notice; and had he possessed merely knowledge that an attachment had been made, that will not avail to prevent a subsequent attachment, if no possession be retained: *Young v. Walker*, 12 Id. 502. It is but the common case of property attached, which goes back into the hands of the debtor by means of a settlement, or receipt, or some arrangement that dissolves the attachment.

The objection to the admission of the return upon the defendant's writ as evidence of the attachment upon that, "because no judgment was ever had thereon," can not avail. The general principle is stated in *Brown v. Davis*, 9 N. H. 76. That the return of the sheriff of matters material to be returned upon a writ, is evidence, seems to be generally admitted. The question has been, whether it is conclusive, or only *prima facie*, evidence. As

between the parties to the suit and those claiming under them as privies, and all others whose rights and liabilities are dependent upon the suit, the return is conclusive.

But it is not conclusive as to third persons whose interests are not connected with the suit, but whose interests may be affected by the proceedings of the sheriff, nor as to collateral facts or matters not necessary to be returned. It is sufficient for the purposes of this case if the return was only *prima facie* evidence. There was nothing to contradict it. And it is not necessary in order to its admission as evidence that the action should have proceeded to judgment and the return have thus become a matter of record. Writs are made returnable to the next term of the court. The officer is commanded to make return of his doings. When served it is proper that they should be returned even if the action is settled. It may be important to the security of the officer. Perhaps it is necessary that the return should become matter of record in order to give it the character of evidence: *Brown v. Davis*, 9 N. H. 79, 81. But it will be so, within our practice, if it be returned and placed upon the files of the court without any extended registry by the clerk as a recording officer. The objection in this case was, not that the writ had not been returned, but that the action had not been prosecuted to judgment. If the objection had been that the writ had not been returned, and such was the fact, the court might have permitted the writ to be filed on motion. This may be done, by leave, after the return day.

There was evidence therefore of a lawful attachment by the defendant, and the agreement to sell and apply the proceeds to the payment of the debt was valid. Whether the statute provisions for that purpose were strictly pursued or not, is of no importance to the plaintiff. The attachment which he made having been dissolved, he has no ground of objection on account of what was done by the parties subsequent to the defendant's attachment.

Judgment on the verdict.

POSSESSION NECESSARY TO CONTINUANCE OF ATTACHMENT LIEN: See *Franklin Bank v. Bachelder*, 39 Am. Dec. 601, and cases cited in note thereto.

REED v. BLAISDELL.

[16 NEW HAMPSHIRE, 194.]

MARRIED WOMAN MAY, WITH THE CONSENT OF HER HUSBAND, dispose of her choses in action, or property held in trust for her by her husband, by will.

SUCH CONSENT OF THE HUSBAND WILL BE PRESUMED from the fact that at the execution of the will he stood by and assented and advised as to the making.

WILL OF A MARRIED WOMAN, VALID AS TO THE DISPOSITION of personal property, but not as to real, may be admitted to probate for the former, although not for the latter.

MARRIED women. The opinion states the facts.

Pierce and Fletcher, for the appellant.

Norris and Gunnison, for the appellees.

By Court, GILCHRIST, J. The instrument which the appellant seeks to establish as the will of Caroline Blaisdell, was made by her during the life-time of her husband; but the evidence very clearly shows that he advised and consented to its being made and published as her will; there is no evidence that he ever afterwards revoked his consent to that act; it also appears that she survived her husband; and there is no evidence that during the period of her exemption from the disabilities of coverture, she herself ever sought to revoke or reconsider the act.

The will in its form is such as would be sufficient to pass real estate if the party executing it had been at the time seised of such, and competent in law to make an effectual devise of it. The rights and disabilities as it regards this subject, pertaining to the state of coverture, are succinctly stated by Mr. Justice Blackstone. "Among the Romans there was no distinction; a married woman was as capable of bequeathing as a *feme sole*. But among us a married woman is not only utterly incapable of devising lands, being excepted out of the statute of wills, 34 and 35 Hen. VIII., c. 5, but also she is incapable of making a testament of chattels, without the license of her husband. For all her personal chattels are absolutely his; and he may dispose of her chattels real, or shall have them to himself if he survives her. It would be therefore extremely inconsistent to give her the power of defeating that provision of the law, by bequeathing those chattels to another. Yet by her husband's license she may make a testament, and the husband frequently upon marriage covenants with her friends to allow her that license. But such license is more properly his assent; for unless it be given to the particular will in question, it will not be a complete testament, even though the husband beforehand hath given her permission to make a will."

In this state in *Marston v. Norton*, 5 N. H. 205, it was held, that a married woman could not in any case make a valid devise of real estate, although her husband at the time of the execution

of the testamentary act, signed and sealed an instrument expressing his assent that she should devise her land. But Richardson, C. J., said that her will of her chattels may be made valid by the assent of her husband, "because the gift is in effect his gift, and the property passes from him." The same is the doctrine of *Osgood v. Breed*, 12 Mass. 532, and the same reason is assigned. The *dicta* in the two cases referred to, relate to the power of the wife in regard to chattels within the absolute control of the husband, and not to choses in action, or to property considered in equity to be hers. In the former case the property is in him both in law and equity; in the latter it is either in the wife, or in others in trust for her, and has been generally recognized as a legitimate subject of the exercise of some kind of testamentary power on the part of the wife. The statute 29 Car. II., c. 3, sec. 24, makes a reservation in favor of the husbands of married women who "die intestate:" *Ree v. Dr. Bettsworth*, 2 Stra. 1111, 1112.

It may not be necessary in the present case, to insist upon any such distinction with reference to the formal nature of the assent required to be given by the husband for the purpose of giving effect to the will of the wife, or with reference to the kind and degree of evidence necessary to establish such assent; but it may yet be pertinent to take notice, that the particular property upon which the testamentary paper was intended to act, was in fact the property of the wife herself, and in the event of her surviving him, which actually occurred, was absolutely hers as against his personal representatives. At least it so appears from all the evidence that is found to exist bearing upon the subject. By the admissions of John Blaisdell himself, the debt due from the two Reeds was hers in the beginning, as having come to her in some manner from her father; so that although the security stood in his name, he was in fact no more than a trustee for her, as he well might have been. And it is no matter whether this chose in action accrued to her before the marriage, as in *Stanwood v. Stanwood*, 17 Mass. 57, or afterward, as in *Nash v. Nash*, cited by the court in that case from 2 Mod. 133. Indeed upon the authority of *Christ's Hospital v. Budgin*, 2 Vern. 683, it might be held to be immaterial what the origin of the debt was, provided the husband saw fit to take the security in the name of the wife, and that in such a case it would survive to her upon his decease, there being no creditors who would be defrauded by such an arrangement.

The authorities contain some disquisition as to the evidence

needful to prove the assent of the husband to the testamentary act of the wife; and it appears that a covenant on the part of the husband that the wife shall so dispose of her property, in general, is not sufficient: *Rex v. Bettesworth (Cullom's Case)*, 2 Stra. 891; although it seems by that case that it would have been sufficient, if it had appeared that the will which she had made was such an one as her husband had so agreed that she might make. But in the present case the evidence is quite clear, that the husband both assented and advised to the making of a will that should dispose of the note of the Reeds, and that when he knew that she had made a will, and saw it executed, he by tacit acquiescence confirms the act, so that no doubt can exist that the instrument set up as her will was made and executed with his consent, and is such a will as he consented to her making, unless the insertion of the clause with respect to the real estate shall appear to vitiate it.

It is not apparent that it can or ought to have any such effect. In *Deane v. Littlefield*, 1 Pick. 243, Parker, C. J., in delivering the opinion of the court says, that "at the common law, a will which was good to dispose of personal estate but not for real, might be set up for the former, though not for the latter." And it appears from the authorities cited by counsel in the argument of that cause, that wills of this description were proved in the spiritual courts. Now the will of a married woman disposing of lands is in all cases merely void, as has been seen. In addition to this, there was no land upon which it could have been intended to operate; so that it was to every intent such a will as the husband consented to her making.

The conclusion therefore is, that the decree of the court of probate disallowing the instrument in question to be proved as the will of the decedent, Caroline Blaisdell, must be reversed, and the same must be admitted to be proved as her will with respect to the personal property therein bequeathed. The case must be remanded to that court for further proceedings in conformity with this decree.

Decree accordingly.

MARRIED WOMAN'S POWER TO DISPOSE OF HER PROPERTY BY WILL: See *Emery v. Neighbour*, 11 Am. Dec. 541; *Barnes' Lessee v. Irwin*, 1 Id. 278.

WILL INVALID AS TO REALTY MAY BE VALID AS TO PERSONALTY: *Kane v. Gott*, 35 Am. Dec. 641; *Guthrie v. Owen*, 36 Id. 311; *Offut v. Offut*, 38 Id. 183.

PAGE v. CARTER.

[16 NEW HAMPSHIRE, 524.]

PROMISSORY NOTE GIVEN BY A DEBTOR FOR THE PURPOSE of inducing a creditor to consent to a composition, is voidable in law or equity.

COMPOSITION IS NOT AVOIDED BY REASON OF ANY UNFAIR PREFERENCE obtained by one creditor through a secret agreement with the debtor.

ASSUMPSIT on a promissory note, to which the defendant pleaded the general issue and the statute of limitations. To take the case from out the operation of such statute, the plaintiff proved that subsequent to the execution of the note the defendants made an assignment for the benefit of their creditors, in which they joined. That certain others of the creditors were induced to join in such assignment in consideration of additional benefits secured to them by a secret agreement with the debtor, knowledge of which did not come to the plaintiff until within six years prior to the commencement of this action. Verdict and judgment were given for the defendant, subject to the opinion of the court.

Farley and Parker, for the plaintiff.

Pierce and Sawyer, for the defendant.

By Court, GILCHRIST, J. It is perfectly well settled, that a note given by a debtor for the purpose of inducing a creditor to consent to a composition, is voidable at law or in equity. One reason assigned for this rule is, that the parties who release their respective claims act together for the common purpose of setting the debtor free from his embarrassments, and each is induced to forego his own claim or a certain part of it, by the consideration that such a benefit shall be fully secured to the debtor; a thing which he would not do upon any inducement short of that; and any creditor who takes from the debtor a note or other security for anything beyond the composition, defeats its object and the intentions of the several parties to it: Lord Kenyon, C. J., in *Cockshott v. Bennett*, 2 T. R. 765.

Another reason is that which is assigned by Mr. Justice Buller in the same case, that the debtor is supposed in such cases to act under the influence of distress and constraint. In *Smith v. Bromley*, cited by that judge and reported in a note to *Jones v. Barkley*, Doug. 695, the same reason is more pointedly stated by Lord Mansfield, whose opinion would have the effect of extending the principle so as to avoid securities entered into by third persons for such a purpose. "If any near relation is induced to pay the money for the bankrupt, it is taking an unfair advantage and torturing the compassion of his family." This

class of persons, as well as sureties, are considered as being comprehended by the rule: *Lewis v. Jones*, 4 Barn. & Cress. 506, and note, in which the cases in the English courts are cited. But none of these cases, nor the reasons upon which they are based, go to the extent of avoiding the composition, by reason of any such unfair preference obtained by a creditor through a secret agreement with the debtor. The rule appears to have been made for his benefit and protection, rather than for the sake of any advantage to the creditors at large; their only interest in the faithful execution of the agreement being that which they justly have in the absolute and full achievement of their purpose in his behalf. To hold therefore that the debtor should be charged with complicity in a fraudulent transaction designed to defeat the measures which have been instituted for his relief, would be to engraft upon that rule of law, an alien branch that would conflict with its beneficial purposes.

The case of *Howden v. Haigh*, 11 Ad. & El. 1033, which has been cited as tending to favor the proposition that such a fraudulent act would defeat, by reason of the debtor's concurrence in it, the benefits to which he would otherwise be entitled under the composition, does not appear to sustain it. The point which is there decided, and to which it is there cited by the writers, is that the fraud destroys the security which the creditor takes for the sum to which he is fairly entitled and the excess also: *Chit. on Con.* 460. These cases of composition between a debtor and his creditor must not be confounded with those which have arisen under the English bankrupt laws, in which it has been held that money paid or secured to a creditor to induce him to sign the bankrupt's certificate, would have the effect of avoiding the certificate, even if such payment or security was made by a stranger, and without the privity of the bankrupt. These cases proceed upon the ground that the policy of the statute, which in terms vacated certificates procured through such influences, required that the creditors should act without such a bias. "The test which the legislature requires, is the unbiased approbation of the creditors." "Although a third person shall not be punished for the fraud of another, he shall not avail himself of it:" *Robson v. Calse*, Doug. 227. Between these two classes of cases there is obviously no analogy.

We are unable from the cases which have been examined, or from the reasons upon which they are in general founded, to derive any such doctrine as that which is propounded by the plaintiffs in this case. There must therefore be

Judgment on the verdict.

EFFECT OF SECRET AGREEMENT BETWEEN A DEBTOR AND HIS CREDITOR, in consideration of which the latter consents to an assignment for the benefit of the former's creditors: See note, and cases cited therein, to *Benedell v. Edgerton*, ante, 503.

PIERCE v. RICKER.

[16 NEW HAMPSHIRE, 322.]

HOLDER OF A PROMISSORY NOTE IS NOT CHARGED WITH NOTICE of its invalidity, from the fact that it was indorsed to him without recourse, and upon discounting the interest thereon.

ASSUMPSIT on a promissory note, given by the defendant to one Rollins, in consideration of the latter's releasing him from all claim for damage, and agreeing not to prosecute him, for adultery committed by him with the latter's wife. The note was transferred to the plaintiff, without recourse to the indorsers, upon payment of the principal due thereon.

N. Eastman, for the defendant.

Wiggin and Hale, for the plaintiff.

By Court, PARKER, C. J. The note appears to have been given along with others, not merely to settle the damages sustained by Rollins, which, standing alone, would have been a good consideration, but the settlement included also, as a part of the consideration, the discharge of the criminal prosecution which had been commenced. This was altogether illegal: *Shaw v. Spooner*, 9 N. H. 197 [32 Am. Dec. 348]; *Hinds v. Chamberlin*, 6 Id. 225; *Plumer v. Smith*, 5 Id. 553 [22 Am. Dec. 478]. Rollins could not have sustained a suit upon the note: *Clark v. Ricker et al.*, 14 Id. 44. Emerson, the first indorser, had full knowledge of the transaction, and stood in no better situation.

But the plaintiffs appear to have purchased this note, and to have paid for it the amount of the principal, without any notice of its invalidity. There is nothing to show that this was not done in the ordinary course of business. The discount of the interest is not to a sufficient amount to render the transaction suspicious. Nor does the fact that Emerson indorsed, stipulating that he would be holden without demand or notice, indicate of itself that the plaintiffs had notice, or should have made further inquiry. Its tendency is rather to hold out on the part of the indorser strong evidence of confidence that the note would be promptly paid when it became due. The inference to be derived from it is the very reverse of that which might pos-

sibly be drawn from an indorsement "without recourse," if that would be sufficient. The plaintiffs therefore appear to be *bona fide* indorsees for value before due, and are entitled to judgment.

Judgment for the plaintiffs.

LORD v. STATE.

[16 NEW HAMPSHIRE, \$25.]

KEEPING A COMMON GAMING-HOUSE IS AN INDICTABLE OFFENSE at common law and in New Hampshire.

HABITUALLY PLAYING CARDS OR DOMINOS IN SUCH A HOUSE, for meat and drink, is sufficient evidence of such offense.

PROOF THAT THE PERSONS FREQUENTING THE HOUSE are of the character described in the indictment, or of specific acts of cursing, swearing, quarreling, and drinking, are unnecessary. Such matters are merely descriptive, and immaterial to the offense charged.

JURY IN A CRIMINAL CASE MUST ACCEPT THE LAW to be as charged by the court.

JURY IN A CRIMINAL CASE SHOULD RENDER THEIR VERDICT of guilty or not guilty orally in open court, and a record should be made thereof. An improper written verdict attempted to be made should be rejected by the court.

INDICTMENT for keeping a gaming-house. The opinion states the facts.

Hale and Wiggin, for the defendant.

Gove, attorney general, for the state.

By Court, GILCHRIST, J. The instructions to the jury to which the exceptions of the defendant relate, were in substance, 1. That keeping a common gaming-house is an offense against the laws of the state. 2. That keeping a house in which cards or dominos are habitually played for something to eat and drink in such house, amounts to the offense. 3. That it was unnecessary to prove that the persons frequenting the house are evil-disposed persons, and otherwise of the character described in the indictment, or to prove specific acts of "cursing, swearing, quarreling, and drinking," alleged. 4. That the jury were bound to regard the instructions of the court as to the law, as proceeding from the source constituted to declare it, and as their best guide.

There are many authorities both ancient and modern which establish beyond controversy that keeping a common gaming-house was an indictable offense at common law: *Rosc. Crim. Ev.*

748; *Rea v. Higginson*, 2 Burr. 1232; *Rea v. Dixon*, 10 Mod. 336; *The King v. Rogier and Humphrey*, 1 Barn. & Cress. 272. The point was fully considered upon argument in the last-named case, and decided in conformity with the uniform current of authorities in the common law. That the common law and the English statutes in amendment of it, so far as they were applicable to our institutions and the circumstances of the country, were in force here upon the organization of the provincial government, and that they have been continued in force by the constitution, so far as they are not repugnant to that instrument, until altered or repealed by the legislature, was a point considered and decided in *The State v. Rollins*, 8 N. H. 550, and we see no ground for drawing in question the correctness of that decision. The necessary conclusion, therefore, is, that the instructions of the court upon the first point were right.

2. A common gaming-house is indictable as a nuisance, and is such, not because a particular description of punishable offenses are commonly committed within its walls, but "because they are temptations to idleness, and because they are apt to draw together great numbers of disorderly persons." Hawk. Pl. Cr., b. 1, c. 75, sec. 6. These mischiefs are quite as likely to result from the kind of gaming described in the instructions of the court, as from gaming for money, whether in large sums or small. Each form of the vice might afford peculiar attractions for its appropriate class of idlers, and give occasion for its appropriate train of social disorders. But each falls apparently within the description of gaming, and tends directly to the evil consequences referred to. It is therefore wholly immaterial that the defendant adduces authorities to show that a single act of playing with cards or dominos for meat or drink is not an offense at law. We think that the jury were properly instructed that the offense was proved by evidence showing that cards and dominos were habitually played in the house for the purposes described.

3. The offense described in the indictment is that of keeping a common gaming-house, and it has frequently been said by good authorities, that it is sufficient if the indictment allege that generally, and no more (*Holroyd, J., in The King v. Rogier et al.*, 1 Barn. & Cress. 273; *Rosc. Crim. Ev.* 743), although it is usual to charge the defendant with procuring persons of evil fame and disposition to assemble there, and to practice the various vices that are apt to be indulged in at such resorts. But

no case is found in which these matters of description have been held to be material. Indeed, the question has been, whether the government should be permitted, in proof of a general charge of keeping a common gaming-house, or the like, to give in evidence particular acts: *Clark v. Periam*, 2 Atk. 339; *J. Anson v. Stuart*, 1 T. R. 752-754; Rosc. Crim. Ev. 744. Those authorities clearly show that it is unnecessary to prove what persons in particular resort to the places complained of; of course any evidence that they were "evil-disposed persons, of evil name, fame, and conversation," if necessary at all, must sometimes be loose and unsatisfactory.

Were the law as is contended by the defendant, prosecutions for keeping a common gaming-house, a common house of prostitution, or an inn, accustomed to harbor thieves and the like, would necessarily resolve themselves into collateral inquiries of a scandalous nature, affecting parties strangers to the record, and into imputations of crimes to those who have no means of defending themselves. We are, therefore, of the opinion that all such matters as the characters and purposes of the visitors to the house, and the particular kinds or modes of gaming pursued there, as well as the existence of the vices of swearing, tippling, and their kindred evils, ordinarily attendant upon the practices which stamp the house with its indictable character, are merely descriptive and immaterial to the essence of the offense charged. It was unnecessary to set them up in the indictment, and equally unnecessary to prove them.

4. The jury were also charged to take the instructions of the court as to the law of the case, as their legitimate and safest guide in the discharge of their duty of rendering a verdict according to law. This the defendant says was erroneous, for the reason that the jury are themselves judges of the law in criminal cases. If that be so, there was little harm in the instruction; nor can the supposed error afford obvious ground for the exception. But the law has been held otherwise in this state, upon due consideration, and the ruling of the court was in conformity with it: *Pierce v. The State*, 13 N. H. 536. We are therefore of the opinion that the instructions of the court to which the exceptions relate afford no cause for setting aside the verdict.

It is said on motion in arrest of judgment, that the verdict of the jury did not cover the whole matter submitted. The custom in criminal cases is for the jury to render their verdict of guilty or not guilty orally in open court, and a record to be made of it. That course was pursued in this case. The written verdict

which the foreman undertook to make, was irregular and was correctly rejected by the court. The verdict of guilty related to the offense charged in the bill.

We are therefore of opinion that the motion must be denied and that there must be

Judgment on the verdict.

GAMING, WHAT CONSTITUTES: See note to *State v. Smith*, 33 Am. Dec. 124.

SMITH v. DURELL.

[16 NEW HAMPSHIRE, 344.]

OBLIGOR IS EXCUSED FROM THE PERFORMANCE OF A DISJUNCTIVE CONDITION, if one of the alternative things becomes impossible by the act of God, or by the act or default of the obligee.

RELEASE OF THE DEBT OR OTHER THING SECURED by a mortgage is a release of the mortgage.

TROVER for a yoke of oxen. After suit was brought on the note referred to in the opinion, the plaintiff released Marsh from all liability to him thereon, and paid the judgment recovered against him. The further facts appear in the opinion.

W. C. Clarke, for the plaintiff.

Hazellon, for the defendant.

By Court, GILCHRIST, J. The condition contained in the mortgage from Marsh to the plaintiff, of the fifth of December, 1840, by which the oxen in controversy were conveyed, was, that the mortgagor should pay a certain note which he had made on the third day of November preceding, for fifty dollars, payable in one year to the mortgagee, or should save the latter harmless from the consequences of having, as the surety of the mortgagee, on the same third day of November, signed a note for a like sum, payable at the same time, to one Foss. If we consider this as a disjunctive condition, it is subject to the rule which gives to the obligor, for whose benefit the condition is inserted, an election between the two things to be done: Com. Dig., Condition, K, 1. And a plain corollary to that rule is, that if one of the alternative things become impossible by the act of God, or by the act or default of the obligee, or if by such conduct on his part as amounts to a clear waiver of its benefits, the obligor becomes excused from the performance of one part, then he is excused from performing the other part: Com. Dig., Condition, K, 2. The present case shows the reasonableness and

the justice of the rule. Although the condition is in form disjunctive, its effect is single, and it is plain that the note which the mortgagor gave to the plaintiff and described in the mortgage, is merely collateral to the implied promise of indemnity which the mortgage was taken to secure, and was designed for no other purpose than to give the plaintiff an additional remedy to enforce that promise. It would therefore be wholly absurd to hold, that upon the release of the principal thing, another which is its mere accessory and security should remain in force.

It is equally clear from reason and authority that a release of the debt or other thing secured by a mortgage, is a release of the mortgage. There is nothing in the form of the release in this case that renders it probable that the parties intended or expected to limit or restrain the ordinary effect of such an act in this particular. It has become unnecessary to consider the other points made by the defendant. And there must upon the ground stated be

Judgment for the defendant.

RELEASE OF DEBT IS A RELEASE OF THE MORTGAGE or other security: *Voss v. Handy*, 11 Am. Dec. 101; *Jackson v. Stackhouse*, 13 Id. 514; *Breckinridge v. Ormsby*, 19 Id. 71.

HIBBARD v. RUSSELL.

[16 NEW HAMPSHIRE, 410.]

WAIVER OF DEMAND AND NOTICE ON A PROMISSORY NOTE need not be in writing, and may be proved by direct evidence, or inferred from expressions and conduct of the parties.

ALLEGATION OF DEMAND AND NOTICE IS PROVED BY EVIDENCE that the defendant waived it, in an action against the indorser.

WITNESS HAVING TESTIFIED TO A CONVERSATION, can not testify as to what he understood to be meant by the language used.

ASSUMPSIT on a promissory note. The opinion states the facts.

Bellows, for the defendant.

Perley, for the plaintiff.

By Court, Woods, J. This is an action by an indorsee of a promissory note against the indorser. The first count sets forth the making of the note on the sixteenth day of November, 1840, payable to the defendant, its indorsement and delivery for value by him to the plaintiff, its presentation to the makers for payment, their refusal, and notice on the same day to the defendant. The second count alleges, that on the seventeenth day of Feb-

ruary, 1841, the plaintiff having the note in his possession which the defendant had for value on that day indorsed and delivered to him, in consideration that the plaintiff at the defendant's request would forbear and give day of payment to the makers till the first day of June next following, the defendant promised to pay him the contents; that he did forbear, etc., of which the defendant had notice. The third count alleges the making of the note on the first day of November, 1840, payable to the defendant; that he, on the seventeenth day of February, 1841, indorsed and delivered the same to the plaintiff, and afterward on the same day waived demand on the makers, and notice, whereby he became liable. The money counts are added.

It was proved, that on the seventeenth day of February, 1841, the defendant, having the note described, indorsed and delivered it for value to the plaintiff on the same day. That after the transaction, within a few minutes, the plaintiff having learned by inquiring of Mr. Ainsworth, the witness, the effect of the indorsements, the two parties came together, and the plaintiff requested the defendant to waive the demand and notice, by an indorsement to that effect upon the note. This Russell declined to do; but said he had agreed to wait on the makers till the following June, and requested the plaintiff to wait also, and not to make demand of payment or give notice; and said that if the makers did not pay the note he would pay it, or would consider himself holden as indorser, and that it should be paid the same as if he waived demand and notice on the back of the note. This was on the day on which the note was indorsed and delivered to the plaintiff, and while he had the undoubted means, by pursuing the course usual in such cases, of fixing beyond any question the liability of the defendant. In consequence of the agreement of the defendant to waive the demand and notice, and by reason of his promise to pay the note if the plaintiff would forbear the demand for a time limited, the plaintiff omitted to make it, as he might and, it is to be presumed, would otherwise have done; and the question is, whether the defendant is bound to pay the note.

It is perfectly settled, that a waiver of demand and notice need not be in writing, and that the modification that such waiver gives to the contract, created by the indorsement and delivery of the negotiable paper, is not such as is by the statute of frauds required to be put in writing; that no fixed verbal formula is necessary to constitute such a waiver, but that like any other fact it may be proved by direct evidence, or inferred from expressions and conduct of the parties: *Fuller v. McDonald*, 8

Greenl. 213 [23 Am. Dec. 499]; *Widgery v. Monroe*, 6 Mass. 450; *Taunton Bank v. Richardson*, 5 Pick. 436. In *Lane v. Steward*, 20 Me. 98, at the time of the indorsement of the notes declared on, the defendant said, if Sargent the maker did not pay the notes when due, he would; and after they became due, and when payment was demanded of the defendant, the indorser, he requested the plaintiff to sue the makers. This was held sufficient. The court there say: "It has been decided that parol testimony to prove a waiver does not contradict the written contract between the indorser and holder; and that a promise to pay if not paid by the other parties when due, made by an indorser at the time of indorsing, may be regarded as a waiver of a demand upon the maker:" *Boyd v. Cleveland*, 4 Pick. 525.

This case presents points of resemblance to the one before us; and there can be no doubt upon the authorities that the evidence in the case proved a waiver of the demand and notice upon the defendant; and that an action may be maintained against him upon his liability as indorser, as if such demand and notice had been given by the plaintiff: *Whitney v. Abbott*, 5 N. H. 378; *Otis v. Hussey*, 3 Id. 347; *Ladd v. Kenney*, 2 Id. 340 [9 Am. Dec. 77]; *Barker v. Parker*, 6 Pick. 81. It appears very distinctly from the case, that the conversation showing the contract of waiver in part took place after the indorsement and delivery of the note to the plaintiff were complete; and consequently the case is not embarrassed by any question as to the competency of parol contemporaneous evidence varying or affecting the written contract. It is also well settled that in an action against an indorser, the allegation of demand and notice is proved by evidence that the defendant waived it: 2 Stark. Ev. 274; *Taunton Bank v. Richardson*, 5 Pick. 436; *Lane v. Steward*, 20 Me. 98.

Another question arises upon the rejection of evidence offered by the defendant, as to whether the witness who testified to the conversation between the parties in 1842, understood that Russell intended to pay the note. The witness had detailed with a good degree of minuteness, the conversation between them, in which the defendant was represented as saying, that he was good for the note, or had got it to pay, using one or the other of those expressions. In one aspect this question resembles one decided at this term in *Braley v. Braley*, 16 N. H. 426, where it was held, that if a witness testify to what was said, he shall not be permitted to testify as to what he understood to be meant by the language used. The inference from the words used, was for the jury to make; who might consider the words in connection

with the attending circumstances. It was not a witness' province to give any opinion on such matters, since he could have in general no better means of forming one than the jury might have furnished to them. So that if the object of the inquiry was, as it seemed to be, to draw forth the witness' opinion of the construction that ought to be given to the defendant's language, the question was an improper one. If however the inquiry was whether the witness really supposed the defendant intended to do what his words might constitute a promise on his part to do, the irrelevancy of the evidence is obvious. Any opinion of the witness on such a subject, would hardly be considered as entitled to much consideration as evidence of the secret purposes of the defendant, while these, if they could be proved, would not be regarded, if they were opposed to the just import and meaning of the language conveying a promise.

The ruling of the court was correct upon this head, and consequently there must be

Judgment on the verdict.

PAROL EVIDENCE OF A WAIVER OF DEMAND AND NOTICE is admissible: *Fuller v. McDonald*, 23 Am. Dec. 490; *Gove v. Vining*, 39 Id. 770; *United States Bank v. Southard*, 35 Id. 521, and prior cases in this series, cited in note thereto.

WAIVER OF NOTICE MAY BE PROVED UNDER AN ALLEGATION OF NOTICE: *Whiteford v. Burckmyer*, 40 Am. Dec. 640.

TOWN OF GRAFTON v. FOLLANSBEE.

[16 NEW HAMPSHIRE, 450.]

TREASURER OF A TOWN IS A COMPETENT WITNESS in an action by the town against a tax collector to recover the amount of taxes collected by him, to prove that the witness in his office of treasurer gave the defendant a receipt for more than the sum which he had actually paid in or accounted for as collector.

RATIFICATION OF A DEMAND MADE BY ONE PURPORTING to act for another may be made by the latter by adopting the action founded upon such demand.

ASSUMPSIT. The opinion states the facts.

Kittredge, for the defendant.

Wilcox, for the plaintiffs.

By Court, GILCHRIST, J. This is an action on the part of the town of Grafton, to recover a sum of money alleged to have been received by the defendant while collector of the town, and

in the discharge of his office as such, for the town's use. A witness introduced by the plaintiffs to substantiate their claim is James M. Kilton, to whose competency objection is taken, upon the ground that while he was the treasurer of the town in June, 1842, the defendant settled with him as such, and that through mistake, the witness in his office of treasurer gave the defendant a receipt for two hundred and sixteen dollars and thirty-four cents more than the sum which he had actually paid in, or accounted for as collector; that that is the money for the recovery of which this action is brought, and that therefore the witness has an interest in the event of the suit. But it is not easy to establish such a conclusion. If the town were to bring an action against the witness alleging his default as treasurer for this sum of money, it would be a clear defense on his part to show that he had not received it, and a judgment in favor of the defendant in the present action could not possibly be set up in any form to prevent or estop such a defense from being made in the case supposed.

The question that is raised appears to be settled by the application of the familiar and well-established rule, which admits the testimony of agents concerning acts done by them in the prosecution of their agency, although its direct tendency may be to exonerate themselves. The doctrine is stated in Greenl. Law of Ev., sec. 416, and is illustrated by numerous authorities which are there cited. Among those which seem apposite to the present case, is that of *Barker v. Macrae*, 3 Camp. 144, which was an action of a shopkeeper to recover a sum of money delivered by one Ash, a carrier, to the defendant, through mistake. The carrier was called as a witness on the part of the plaintiff, and it was objected that he was interested. He was *prima facie* liable himself, and he must repay the money to the plaintiff, unless by his evidence he could fix the defendant. Lord Ellenborough held that he was a witness from necessity, and might be examined without a release. It might have been added, perhaps, that a judgment in favor of the defendant in that case would not have estopped the witness, Ash, in an action by the tradesman for not delivering the money, from showing that he actually did deliver it. The better reason for charging him with having an interest in the suit was, that upon a recovery by the plaintiff against the defendant, and a satisfaction of the judgment, no possible claim could exist against the witness at the plaintiff's suit. But as has been remarked, it was a case in which the tendency of such a judgment to exonerate the wit-

ness, is not considered in law a sufficient objection to his competency to testify: *Phelps v. Sinclair*, 2 N. H. 554. For this reason it becomes unnecessary to inquire into the effect of the proceedings of the town with a view to releasing the witness from all claim founded upon his supposed liabilities, except to remark that these proceedings have the effect of adopting the suit commenced in the name of the town, and of releasing him from all liability in respect to costs arising from it.

Its effect is also to settle a question that arose upon the demand, supposed to be a necessary preliminary to bringing the action, since it ratifies the demand made by Kilton. That individual had no express authority to make such a demand, nor any authority implied in his office of treasurer, whose duties are simply to receive money and to disburse it upon the proper orders. But the payment of the money to him by the defendant, would have been a sufficient discharge from his debt to the town, and this was well known and not questioned by the defendant at the time. The town, by adopting the action founded upon that demand, ratified the demand also. The case comes within the principles of *Payne v. Smith*, 12 N. H. 34, and of *Ham v. Boody*, 14 Id. 27. "Where a demand is made by an attorney, the party has a right to require reasonable evidence of the authority of the individual to make it. But if no exception is taken at the time, then a subsequent commencement of a suit by the party in whose behalf it was made, claiming under such a demand, is a ratification of the act, and *prima facie* proof that it was made with his authority."

Judgment on the verdict.

CASES
IN THE
COURT OF CHANCERY
OF
NEW JERSEY

MANNING v. CRAIG.

[3 GREEN'S CHANCERY, 436.]

GIFT OF PRODUCE OF A FUND, without limit as to time, is a gift of the fund. INTEREST OF LEGATEES IS VESTED AND ASSIGNABLE where the testator bequeaths them certain stock, "to remain unsold," and the dividend from it to be equally divided among them.

CHANCERY WILL AID IN CARRYING OUT TESTATOR'S INTENT, and, to save the fund from loss or great depreciation, may change its mode of enjoyment.

BILL by legatees of John Terrill to recover from a surviving executor dividends on certain stock, and to have the stock itself divided. The bequest of the stock was as follows: "Two hundred and fifty-one shares of stock that I hold in the Great Western Turnpike Company in the state of New York, to remain unsold, and the dividends arising thereon I direct to be equally divided between my sons, * * * and my daughters." The cause was heard upon bill, answers, replication, and proofs.

Wall, for the complainant.

I. H. Williamson, for the surviving executor.

Lupp, for S. Mundy.

G. A. Vroom, for the administrator of D. T. Terrill and others.

HAINES, Chancellor. The turnpike stock is an absolute specific legacy, to be enjoyed by the receipt of the dividends. The gift of the produce of a fund, without limit as to time, is a gift of the fund. The interest of each of the legatees is therefore

vested and assignable. The court of chancery will lend its aid to carry out the intent of the testator; and to save the fund from loss or great depreciation, may change its mode of enjoyment. In this case, as the stock is depreciating, I think it should be divided among the legatees or their representatives. In taking the account, the master will inquire: First, who are entitled to the stock and its dividends, and the amount of their respective interests; secondly, what amount of dividends the executor has received and paid out, and to whom paid; how much remains in his hands, and to whom it is due, making all just allowances.

Order accordingly.

The subsequent proceedings in the principal case can be seen by a reference to the case of *Craig v. Manning*, 4 Halst. Ch. 806.

LEGACIES VEST, WHEN: See *Stone v. Massey*, 1 Am. Dec. 345; *Price v. Watkins*, Id. 222; *Boone v. Sinkler*, Id. 622; *Fairly v. Kline*, 4 Id. 414; *Scott v. Price*, 7 Id. 629; *Drayton v. Grimke*, 24 Id. 419.

INTENTION OF TESTATOR GOVERNS CONSTRUCTION OF WILL: *Morton v. Barrett*, 39 Am. Dec. 575, and note referring to other cases in this series. Equity will not entertain jurisdiction merely to construe a will: *Bussey v. McKie*, 16 Id. 628; nor has it jurisdiction to construe devices of legal interests in land: *Hough v. Martin*, 34 Id. 403.

GIFT OF THE PRODUCE OR INTEREST OF A FUND without limitation as to the extent of its duration is, *prima facie*, a gift of that produce or interest in perpetuity, and is consequently a gift of the fund itself: *Garret v. Rex*, 31 Am. Dec. 447; and see *Davis v. Richardson*, Id. 581.

WHITTEMORE v. COSTER.

[3 GREEN'S CHANCERY, 438.]

BILL IS NOT DEMURRABLE BECAUSE OF MISJOINDER OF PARTIES, where the defendants, though not all necessary, are not improper parties.

ORIGINAL BILL TO CORRECT A FORMER DECREE WILL BE SUSTAINED, where the facts set forth are such that it is difficult to divest them of the charge of fraud.

BILL for relief, stating that the Monroe Manufacturing Company in 1839 had conveyed to complainant a tract of land in Paterson; that complainant had examined the title, and learned that the tract had been conveyed to the Monroe company by the Society for Establishing Useful Manufactures in 1838; that the title of the latter to the premises was ancient and unquestioned, and that there was no incumbrance on the land; and that complainant went into possession. The bill further alleged that complainant knew of no incumbrance on the land till a short time before he filed this bill, when he ascertained that

the property was advertised for sale upon an execution against the Monroe company, issued on a decree for the foreclosure of a mortgage held by Coster. The mortgage was given to secure payment for certain premises sold by Coster to Mann and Berry, in 1831, and including the plaintiff's tract. The premises sold to Mann and Berry were conveyed to one Wheeler, who gave a mortgage for the purchase price, which was assigned to one Parsons; and the premises subsequently passed to the Monroe Manufacturing Company; that the Society for Useful Manufactures successfully defended an ejectment brought against them for the tract in question, and the Monroe company purchased the lot from it, the title obtained from Coster being utterly defective; that Coster had notice of the action of ejectment, but refused to defend; that Coster knew the extent of the title conveyed to Mann and Berry, and that it did not cover the tract in question. The bill prays that the decree of foreclosure and execution be so amended and rectified as not to cover the complainant's lot; that Parsons may be restrained from proceeding against it on his mortgage; and that the other defendants be decreed to have no interest in the lot. A decree *pro confesso* was taken against all the defendants, except Coster, who demurred.

E. Vanarsdale, in support of the demurrer.

E. B. D. Ogden and A. Whitehead, contra.

HAINES, Chancellor. There is a decree *pro confesso* against all the defendants but John G. Coster, who demurs to the bill for multifariousness; and first, because of unnecessary parties. The defendants, if not all necessary, are not improper parties. Most of them have an interest in the object of the suit, and are, therefore, proper and necessary parties: Calvert on Parties, c. 1, sec. 1, p. 3; Story's Eq. Pl., sec. 77, 97, and cases there referred to. Coster is made defendant because he was the complainant in a former bill, and is charged with wrongfully pressing a sale of the premises claimed by the present complainant, Whittemore. Parsons, as the assignee of the mortgage given by Wheeler to Lawrence, on the same premises, and entitled to the surplus. Mann and Berry, as the mortgagors to Coster, and obligors, responsible for the residue on the bond, after deducting the amount of the sales, and directly interested in the result of those sales. The Monroe Manufacturing Company, as mortgagors to Coster, and grantees of the equity of redemption, are not necessary, but are proper and usual parties: *Free*

land v. Loubat, 1 Green's Ch. 104. The complainant may make them parties if he choose, and the bill is not on that account demurrable: *Chester v. King et al.*, Id. 405. The receivers, as the representatives of the company, are to be regarded in the same light.

The second ground of objection is, multifariousness in the object of the bill, which seeks a reversal or correction of a former decree. This presents a more serious question, namely, whether a court of equity will sustain an original bill filed to correct a former decree. Judge Story, in his equity pleadings, p. 342, sec. 426, says: "There is no doubt of the jurisdiction of courts of equity, to grant relief against a former decree, where the same has been obtained by fraud and imposition; for these will infect judgments at law, and decrees of all courts; but they annul the whole in the consideration of courts of equity. This must be done by an original bill; and there is no instance of its being done by petition, though it seems once to have been thought that a decree, as well as an interlocutory order, could be set aside for fraud by petition only. Where a decree has been so obtained, the court will restore the parties to their former situation, whatever their rights may be." In *Sheldon v. Fortescue Aland*, 3 P. Wms. 111, Lord Chancellor King says: "I admit even a decree, much more an interlocutory order, if gained by collusion, may be set aside on petition; *a fortiori*, may the same be set aside by bill." But it is supposed that this was said in relation to a case in which the decree had not been enrolled, and where the fact of fraud could not be controverted. And in *Musiel v. Morgan*, 3 Bro. Ch. 74, Lord Thurlow expressly overruled the doctrine of relief by petition, and said he could see no reason why it might not be obtained by an original bill, in the nature of a bill of review. In *Cocker v. Bevis*, 1 Ch. Cas. 61, a bill for such purpose was sustained, not so much on the ground of fraud, as on its own special circumstances, namely, that the original decree of foreclosure was to be entered, unless the money was paid at a certain time, and the money was not paid, from circumstances of inevitable necessity, without willful default.

There is no express allegation of fraud in this bill, but the facts set forth are such that it is difficult to divest them of the charge of fraud. If the defendant, Coster, as the bill charges and the demurrer for the purpose of this argument admits, knew that the description of his mortgage embraced more land than the mortgagor had title to, yet took his decree for the

whole, and insists upon selling the whole, to the prejudice of the complainant, it looks very much like fraud. If the allegation is untrue, he may call its truth in question by his answer, and relieve himself of the implication of fraud. Whether there is fraud or not in the case, the special circumstances of it forbid the allowance of the demurrer. The defendant may avail himself of the objection, if there is anything in it, by plea or answer, and I deem it best to retain the bill for further inquiry.

Let the demurrer be overruled with costs.

Order accordingly.

MULTIFARIOUSNESS: See *Vann v. Hargett*, 32 Am. Dec. 689; *Beardsley v. Knight*, 33 Id. 193; *Herrington v. Hubbard*, Id. 426; *Johnson v. Brown*, 37 Id. 556, in the note to which other cases in this series are referred to.

EQUITY WILL RELIEVE AGAINST JUDGMENTS OR DECREES on the ground of fraud: *Crase v. Conklin*, 22 Am. Dec. 519; but the fraud must be specifically and particularly set forth: *Pendleton v. Galloway*, 34 Id. 434. See also *Emerson v. Udall*, 37 Id. 604.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

MYERS v. MALCOLM ET AL.

[6 HILL, 292.]

KEEPING OF LARGE QUANTITY OF GUNPOWDER IN WOODEN BUILDING, near other buildings, amounts to a public nuisance, and renders the person so keeping it liable for damages resulting therefrom, although he may not have been guilty of any negligence in causing the fire from which such damages resulted.

EVIDENCE THAT DEFENDANT WAS A MAN OF WEALTH is not admissible in an action for damages resulting from a nuisance erected and maintained by him.

WHERE IRRELEVANT TESTIMONY IS ADMITTED AGAINST OBJECTION, a motion for a new trial, made upon a bill of exceptions, will be granted without inquiring how far such testimony may have influenced the verdict.

CASE. The action was brought to recover damages for an injury caused to the plaintiff by the explosion of a quantity of gunpowder belonging to the defendants. The defendants deposited about six hundred pounds of powder in kegs in the upper story of a wooden building used as a carpenter's shop. Near this shop were a lumber yard and several wooden buildings, some of which were inhabited dwellings. No fire was allowed in the building in the day-time, and it was locked up each night. The shop took fire in the night-time, and during the progress of the fire the powder exploded, killing several persons and wounding others, among whom was the plaintiff. The other facts appear from the opinion.

J. B. Lawrence and J. A. Spencer, for the defendants.

B. D. Noxon, for the plaintiff.

By Court, NELSON, C. J. The charge of the circuit judge, as detailed in the bill of exceptions, is not very explicit, but we may fairly assume, I think, that the case was put to the jury on the question whether the conduct of the defendants, in regard to the manner of depositing the powder, was such as to render them guilty of a public nuisance; and if that point has been properly determined in favor of the plaintiff, then I apprehend his right to private damages must follow as a corollary. In this view, the question of negligence on the part of the defendants, except so far as it may be necessarily involved in the question of nuisance, has very little, if anything, to do with the case. But, on the other hand, if the defendants' conduct was not sufficient to render them chargeable with the offense mentioned, then the whole gist of the action lies in negligence, and the inquiry might arise whether this was so connected with the injury as to render the defendants liable. Perhaps evidence enough was given at the trial to have justified the judge in putting the case to the jury in either aspect; though the most satisfactory position for the plaintiff, I am inclined to think, and the one most difficult to be answered by the defendants, is the ground that the depositing and keeping of the powder in the exposed situation described by the witnesses, amounted to a public nuisance, and that any individual sustaining a special injury from the act, was entitled to his private damages.

It was not doubted in the case of *The People v. Sands*, 1 Johns. 78 [3 Am. Dec. 296], that the act of *carelessly* keeping fifty barrels of gunpowder in a house in the village of Brooklyn, was a nuisance at common law. The allegation in the indictment there was, that the defendants kept the barrels "in a certain house, near the dwelling-houses of divers good citizens, and near a certain public street," without otherwise characterizing the manner of keeping the article; and, upon the principle that nothing will be intended or inferred to support an indictment, the court said, for aught they could see, the house might have been one built and secured for the very purpose of keeping powder in such a way as not to expose the neighborhood. Spencer, J., dissented, holding that enough appeared to make the question one for the jury to settle, who could inquire into the various circumstances of place, quantity, exposed situation of the neighborhood, etc.

In a case before Lord Holt, *Anonymous*, 12 Mod. 342, the defendant was indicted and convicted for keeping several barrels of gunpowder in a house in Brentford Town, sometimes two days, and sometimes a week, till he could conveniently send

them to London. And it was there resolved, "that though gunpowder be a necessary thing and for defense of the kingdom, yet if it be kept in such a place as it is dangerous to the inhabitants or passengers, it will be a nuisance." In *Rex v. Taylor*, 2 Stra. 1168, the king's bench granted an information against the defendant for a nuisance, upon "affidavits of his keeping great quantities of gunpowder, to the endangering of the church and houses where he lived," or, as it should have been expressed, according to Burns, "to the endangering of the lives of his majesty's subjects:" 2 Burns' Just. 667, 668; 1 Russ. on Cr. 297, and note (o).

I think the jury would have been well warranted in finding the defendants guilty of the offense, upon the facts disclosed in this case, as it can not be doubted that the gunpowder was deposited in a building insufficiently secured and protected, and altogether unfit for the safe keeping of so large a quantity of the article. The situation of the building in other respects, moreover, was such as to render the gunpowder dangerous to the lives of the citizens; for an explosion, either by accident or design, at any period of time after the deposit, would, in all human probability, have proved destructive to more or less of the inhabitants residing in the neighborhood.

Assuming that the jury were justified in coming to this conclusion, the authorities are abundant to show that the defendants were answerable to the plaintiff for the personal injury occasioned by the explosion. The principle is stated by Abbott, C. J., in *Duncan v. Thwaites*, 3 Barn. & Cress. 556. He there said: "I take it to be a general rule that a party who sustains a special and particular injury by an act which is unlawful on the ground of public injury, may maintain an action for his own special injury." The following cases exemplify and apply the principle, viz.: *Rose v. Miles*, 4 Mau. & Sel. 101; *Henly v. The Mayor etc. of Lyme Regis*, 5 Bing. 91; S. C., 3 Barn. & Adol. 77; S. C., in error, 1 Bing. N. Cas. 222; *Pierce v. Dart*, 7 Cow. 609; *Lansing v. Smith*, 8 Id. 146; S. C. in error, 4 Wend. 25, per Walworth, Chancellor [21 Am. Dec. 89]; *Mills v. Hall*, 9 Id. 315 [24 Am. Dec. 160].

But a new trial must be granted in this case for the error of the judge in admitting evidence of the wealth of one of the defendants. This was clearly inadmissible, and it is impossible to say what effect it may have had upon the verdict; nor is it important to inquire, as this is a bill of exceptions. The plaintiff was entitled to the damages he had sustained, and

nothing more, without regard to the ability or poverty of the defendants. The admission of the evidence implied at least that the jury might graduate their verdict in some measure by the means possessed by the defendants to satisfy it.

New trial granted.

EVIDENCE OF PECUNIARY ABILITY OF PARTIES, WHEN ADMISSIBLE ON QUESTION OF DAMAGES.—In *Grable v. Margrave*, 38 Am. Dec. 88, it was decided that evidence of a defendant's pecuniary ability is admissible, in an action for the seduction of the plaintiff's daughter, and that such evidence should be considered by the jury in estimating the damages. See also the note to that case for other cases on this subject.

PRIVATE ACTION FOR PUBLIC NUISANCE: See note to *Stetson v. Faxon*, 31 Am. Dec. 132, where this subject is considered at some length. The principal case is cited in *First Baptist Church of Schenectady v. Utica & S. R. R. Co.*, 6 Barb. 317; in *Northern Turnpike Co. v. Smith*, 15 Id. 359; and in *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 62, to the point that occupants of real estate, who sustain special damage from the existence of a public nuisance, may maintain an action; but such damage must be distinct from that suffered by other citizens. It is also cited in *Hay v. Cohoes Co.*, 3 Barb. 48, and in *Hudson River R. R. Co. v. Loeb*, 7 Rob. 424, to the point that any one who sustains a special injury by a disturbance of a servitude or easement of way in a public highway, may maintain an action. And in *First Baptist Church in Schenectady v. Schenectady & Troy R. R. Co.*, 5 Barb. 86, to the point that where a party is disturbed in the lawful enjoyment of his property by the wrongful act of another, and he sustains an injury thereby, an action lies.

NEW TRIAL, WHEN GRANTED FOR ADMISSION OF IRRELEVANT TESTIMONY. In *Watson v. Proprietors*, 31 Am. Dec. 49, it was held that the admission of irrelevant testimony was not ground for a new trial. In the note to that case other cases on this subject are collected. The principal case is cited in *Baile v. Harmony Fire Ins. Co.*, 3 Bosw. 516, to the point that where no possible injury could have resulted by the admission of irrelevant evidence, a new trial will not be granted. But in *Cunliff v. Mayor of Albany*, 2 Barb. 194; in *Boyle v. Colman*, 13 Id. 44; and in *People v. Parish*, 4 Denio, 156, the principal case is cited in support of the proposition that, upon a bill of exceptions, a new trial will be granted if immaterial evidence has improperly been admitted. And in *Forest v. Forest*, 3 Abb. 158; S. C., 6 Duer, 146; in *Moody v. Osgood*, 50 Barb. 633; in *Wakeman v. Sherman*, 9 N. Y. 92; and in *Kniffen v. McConnell*, 30 Id. 289, it is cited to the point that a new trial will be granted, if evidence of the wealth of a defendant has been admitted, and it is possible that the admission of such evidence influenced the minds of the jury unfavorably towards him.

KEEPING OF GUNPOWDER IN LARGE QUANTITIES near dwelling-houses is a nuisance at common law: *Bradley v. People*, 56 Barb. 73; *Heeg v. Licht*, 16 Hun, 259; S. C., 80 N. Y. 584, all citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Lewis v. Chapman*, 19 Barb. 256, on the point of the admissibility of evidence of a defendant's wealth.

VAN ETTEN v. HURST AND CUSHING.

(6 HILL, 311.)

IN *TRESPASS DE BONIS*, PLEA THAT THE GOODS BELONGED TO THIRD PERSON, and that the defendant took them by virtue of an attachment against him, gives no color for the action, and is obnoxious to the objection of amounting to the general issue; but if the plea admits that the property was taken from the possession of the plaintiff, it gives color, and will be held good.

SPECIAL PLEADER IS NOT ALLOWED TO LEAVE HIS PLEADING OPEN TO DIFFERENT CONSTRUCTIONS, and then take his choice between them.

WHERE PARTY PROCEEDING BY ATTACHMENT ATTACKS A SALE on the ground that it was fraudulent and void as against creditors, he must show that the justice had jurisdiction and that the process was regularly issued. And this is necessary to the justification of the officer as well as the creditor.

ATTACHMENT AGAINST NON-RESIDENT DEBTOR, under the act to abolish imprisonment for debt, may issue without any affidavit; and an affidavit made in such proceeding is extrajudicial. But the plea must, in such a case, show that the debtor was a non-resident, and that the plaintiff in the attachment was his creditor; and an averment that the justice issued the attachment on an affidavit of these facts will not avail.

FACTS ON WHICH JURISDICTION DEPENDS MUST BE SET FORTH in a plea of justification under an attachment, where it is necessary to show jurisdiction. General averments that the party complied with the statute, and that the proceedings were according to its requirements, will not answer.

DEMURRER to pleas. The facts appear from the opinion.

W. Porter, jun., for the plaintiff.

D. Pratt, for the defendants.

By Court, BRONSON, J. The pleas allege that the plaintiff claimed the goods under a pretended sale thereof by Simon Van Etten to the plaintiff, which pretended sale was void, and that the goods were the property of Simon. If there was nothing else in the pleas, they would be bad. They would give no color for the action, and consequently be obnoxious to the objection of amounting to the general issue: *Brown v. Archer*, 1 Hill, 266. But the pleas admit that the property was taken from the possession of the plaintiff, and so plainly give color. The plaintiff's possession was sufficient to give him an action of trespass against a stranger, although the property belonged to another. The defendants admit the plaintiff's right to sue, unless they can justify under the process against Simon. Such a plea is not bad for lack of color. It does not amount to the general issue; but confesses and avoids the action.

The defendants evidently intend to attack the plaintiff's title to the goods under the sale from Simon Van Etten, on the ground that the sale was fraudulent and void as against creditors. True, the pleas say nothing about creditors, and it is possible that the sale was bad for some other fraud. But a special pleader is not at liberty to leave his pleading open to different constructions, and then take his choice between them. If the defendants mean that there was such a fraud on the part of the plaintiff that the title did not pass as between the parties to the sale, they should have said so. But there can be little doubt that the defendants mean to attack the sale on the ground that, although it may be good as between the parties to it, it was fraudulent and void as against creditors. To do this, they must show a judgment as well as execution; or where, as in this case, they proceed by attachment, they must show that the justice had jurisdiction, and that the process was regularly issued. And this is necessary to the justification of the officer, as well as the creditor: *High v. Wilson*, 2 Johns. 46; *Noble v. Holmes*, 5 Hill, 194, and note (b). In most cases, process, regular upon its face, will be a sufficient protection to the officer; but it is otherwise when the process is used for the purpose of avoiding a sale under the statute of 13 Eliz. There the officer must show a good foundation for the process.

Attachments against non-resident debtors under the thirty-third section of the non-imprisonment law, Stat. 1831, p. 403, may issue without any affidavit: *Clark v. Luce*, 15 Wend. 479; *Bates v. Rehyea*, 23 Id. 336. What is said in the pleas about an affidavit is therefore a matter of no moment, and may be laid out of the case. The pleas are then bad because it is not stated or averred that Simon Van Etten was a non-resident of the county. Without such an averment it does not appear that the justice had any jurisdiction to issue the attachment. Instead of stating that Cushing made affidavit of the non-residence of the debtor, the pleas should have alleged that in point of fact he was a non-resident. As the statute does not require an affidavit, I do not see how any benefit can be claimed from the fact that one was made. Indeed, it seems to be an extrajudicial oath, which can do no good in any point of view. The general allegations in the pleas that Cushing applied for the process pursuant to the statute, that he complied with the requirements of the statute, that the justice had jurisdiction, and issued the process in pursuance of the statute, and the like, are of no avail. Where it is necessary to show jurisdiction, the

party must allege the existence of the facts on which jurisdiction depends: *Sackett v. Andross*, 5 Hill, 327.

The pleas are also bad because it is not averred that Cushing was a creditor of Simon Van Etten. No one but a creditor had a right to attack the sale to the plaintiff: *Damon v. Bryant*, 2 Pick. 411. The affidavit that Simon Van Etten was indebted to Cushing will not aid the pleas, for the reasons already mentioned.

Judgment for the plaintiff.

WHO MAY ATTACK CONVEYANCES ON GROUND OF FRAUD: See *Miller v. Miller*, 39 Am. Dec. 597, note 599, where other cases are collected. In *Thurber v. Blanck*, 50 N. Y. 86, the principal case is cited in support of the proposition that none but judgment creditors can attack a fraudulent transfer.

OFFICER SEIZING UNDER ATTACHMENT, must show that it was regularly issued: *Thayer v. Willett*, 9 Abb. 331; S. C., 5 Bosw. 357; *Decker v. Bryant*, 7 Barb. 186; *Rinchey v. Stryker*, 26 How. Pr. 80; S. C., 23 N. Y. 50, all citing the principal case.

FACTS UPON WHICH JURISDICTION DEPENDS MUST BE STATED, and it is not enough to allege in general terms that the court had jurisdiction: *Turner v. Roby*, 3 N. Y. 195; *Barnes v. Harris*, 4 Id. 380; *People v. Rancker*, 5 Id. 118, all citing the principal case.

THE PRINCIPAL CASE IS CITED in *Glazier v. Clift*, 10 Cal. 304, to the point that an officer, in order to justify the seizure of property in possession of a stranger to the writ which he has executed, must plead specially such justification; and in *Meehan v. Williams*, 2 Daly, 372; S. C., 36 How. Pr. 74, in support of the proposition that a plaintiff, having established that he is a creditor of a fraudulent grantor, and having made the grantee in the fraudulent conveyance a party, is entitled to have the conveyance declared void, so far as it interposes an obstacle to the enforcement of his lien. It is also cited in *Van Kirk v. Wilde*, 11 Barb. 524, as an authority for the position that an affidavit for attachment is not necessary. But in the case of *Taylor v. Heath*, 4 Denio, 596, Beardale, J., who delivered the opinion of the court, referring to the principal case, and others following it on the point last referred to, said: "I think it will be seen that a provision in the statute, explicit in its terms, and direct to the purpose, was entirely overlooked, in deciding them, and which to my mind is a decisive objection to them as authority." And in this case it was held, that an affidavit of non-residence was necessary.

VAN RENSSELAER v. JEWETT.

[6 HILL, 373.]

CAUSE CAN NOT BE REFERRED UNLESS THERE IS AN ACCOUNT, in the ordinary sense of that term, between the parties, even though there may be many items of damage.

WHERE PLAINTIFF SUES ON COVENANT IN LEASE RESERVING RENT, payable in grain, fowls, and services, and the defense does not go to the items in the claim, but denies the defendant's liability altogether, there can be no reference.

DECISION OF CIRCUIT COURT ORDERING A REFERENCE, MAY BE REVIEWED by the supreme court.

COVENANT to recover nine years' rent. The annual rent reserved in the lease was eighteen and three fourths bushels of wheat, four fat hens, and one day's service with carriage and horses. The defendant denied all liability. The circuit judge ordered a reference, and the defendant moved to vacate the order.

R. W. Peckham, for the defendant.

D. Cady, for the plaintiff.

By Court, BRONSON, J. Where there is no account between the parties, in the ordinary acceptation of that term, the cause can not be referred, although there may be many items of damage: *Thomas v. Reab*, 6 Wend. 503; *Silmsier v. Redfield*, 19 Id. 21; *Dederick v. Richley*, Id. 108. If there had been payments in money or other things, and the question was whether any part or how much of the rent was in arrear, there might, perhaps, be a reference. But here the defendants claim nothing in the way of payment; but rest their defense on the ground that they were never liable for the rent which the plaintiffs claim. The cases do not come within the statute. Although the circuit judge may order a reference with the like effect as if the order was made by this court, it is settled that we may review his decision, and revoke the order: *Thomas v. Reab*, 6 Wend. 503; *Levy v. Brooklyn Fire Ins. Co.*, 25 Id. 687. We could review the decision if it had been made by ourselves.

Motions granted.

CITED in *Batchelor v. Albany City Ins. Co.*, 6 Abb. Pr. (N. S.) 243; S. C., 37 How. Pr. 409; S. C., 1 Sweeney, 350, to the point that where the defendant denies all liability for rent, there is no account, in the ordinary acceptation of the term; in *Masterton v. Howell*, 10 Abb. Pr. 118, to the point that in a case requiring an investigation of a long account, and not requiring the decision of difficult questions of law, a reference may be made; in *Harris v. Mead*, 16 Abb. 259, to the point that a case involving but few items is not referable; in *McLean v. East River Ins. Co.*, 8 Bosw. 701, to the point that mere items of damage do not constitute an account; in *Turner v. Taylor*, 2 Daly, 282, and in *Townsend v. Hendricks*, 40 How. Pr. 154, to the point that where an action involves an examination of a long account, it is referable; in *Terry v. Hunter*, 3 Id. 183, and in *McCullough v. Brodie*, 13 Id. 347, to the point that the supreme court entertains motions to vacate orders of reference; and in *Dewey v. Field*, Id. 439, to the point that references, under the revised statutes, were confined to cases upon contract. But in *Lee v. Tillotson*, 35 Am. Dec. 624, it was held that the power of reference was not restricted to matters of account, or even to actions arising *ex contractu*, under the New York statute.

STARK v. BOSWELL.

[6 HILL, 406.]

DECLARATIONS MADE BY OWNER OF CHOSE IN ACTION are not admissible to affect the rights of one who derives title from him. And, therefore, the declarations of a mortgagee that the mortgage was usurious, can not be admitted to affect the title of a purchaser under it, although such mortgagee died before the trial.

ENJOINTMENT. The defendant set up title under a mortgage executed by the plaintiff to one Chittenden. After Chittenden's death, his executors foreclosed the mortgage, became the purchasers at the sale, and afterwards conveyed to the defendant. The plaintiff offered to prove by the declarations of Chittenden, made before the mortgage fell due, that it was usurious. The evidence was rejected, and a verdict having been rendered for the defendant, the plaintiff moved for a new trial on a bill of exceptions.

H. Gay, for the plaintiff.

S. Matthews, for the defendant.

By Court, NELSON, C. J. It has been held several times by this court, that declarations made by the owner of a chose in action are not admissible to affect the rights of one deriving title from him: *Kent v. Walton*, 7 Wend. 256; *Whitaker v. Brown*, 8 Id. 490; *Beach v. Wise*, 1 Hill, 612. The mortgage in question was a mere chose in action, and there is nothing to take this case out of the above rule. The fact of the mortgagee having died before the trial, makes no difference: *Beach v. Wise*, *supra*. His declarations were properly rejected, and the motion for a new trial must therefore be denied.

New trial denied.

DECLARATIONS OF FORMER OWNER, WHEN ADMISSIBLE AGAINST HIS SUCCESSOR IN INTEREST: See *Padgett v. Lawrence*, 40 Am. Dec. 232, and note 240; *Carpenter v. Hollister*, 37 Id. 612, note 615, where other cases are collected. The principal case is cited to the point that the declarations of the owner of a chose in action are not admissible to affect the rights of one subsequently deriving title from him, in the following cases: *Jones v. East Soc. M. E. Ch. of Rochester*, 21 Barb. 174; *Christie v. Bishop*, 1 Barb. Ch. 115; *Savage v. Murphy*, 8 Bosw. 87; *Tousley v. Barry*, 16 N. Y. 500. It is also cited in *Smith v. Webb*, 1 Barb. 234, to the point that a plaintiff who is a purchaser in good faith and for a valuable consideration, can not be subjected to loss by the previously made admissions of third persons having no interest in the suit; and in *Jermain v. Worth*, 5 Denio, 344, to the point that the declarations of a former owner of a negotiable promissory note, while he

held it, are not admissible against one to whom it was transferred for value after maturity.

THE PRINCIPAL CASE IS CITED in *Edlington v. Aina Life Ins. Co.*, 13 Hun, 547, to the point that the fact that the party who made the declarations has since died, makes no difference.

SILSBURY ET AL. v. McCOON ET AL.

[6 HILL, 426.]

WHERE GRAIN WRONGFULLY TAKEN IS MANUFACTURED INTO WHISKY, its identity is destroyed, and the property therein is changed and becomes that of the manufacturer.

TROVER for a quantity of whisky. The sheriff levied upon five hundred bushels of grain, by virtue of a *fi. fa.* against one Wood, in favor of one Mason. The grain was left in Wood's distillery after the levy and was converted into whisky by the plaintiffs, who succeeded Wood in the possession of the distillery. On the tenth of March, 1843, the plaintiffs settled with the sheriff for the grain, giving him their note for the value of it, which was afterwards accepted by Tymason as so much paid upon the *fi. fa.* On the twenty-fifth of February, 1843, one of the deputies of the sheriff seized the whisky in question by virtue of a *fi. fa.*, issued against Wood in favor of the defendants. The deputy sold the whisky, and the defendants bid it in. The circuit judge ordered a nonsuit, and the plaintiffs moved for a new trial on a bill of exceptions.

S. Wilkeson, jun., for the plaintiffs.

N. Hill, jun., for the defendants.

By Court, NELSON, C. J. Even conceding that the settlement with the sheriff for the taking and conversion of the grain was inoperative (which I should not be willing to admit, if made in good faith), still, a decisive answer to the defense is, that the identity of the grain was destroyed by the act of manufacturing it into whisky, and the property in the new article vested in the plaintiffs. The doctrine on this subject is stated by Blackstone as follows: "By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement. But if the

thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials which he had so converted. And these doctrines are implicitly copied and adopted by our Bracton, and have since been confirmed by many resolutions of the courts:" 2 Bl. Com. 404; and see Bro. Abr., tit. Property, 23; Moore, 20; Poph. 38; Vin. Abr., tit. Trespass (H. a. 3), pl. 8; Id., tit. Property (E.), pl. 5; *Betts v. Lee*, 5 Johns. 348 [4 Am. Dec. 368]; 2 Kent's Com. 364. The same doctrine was laid down in *Brown v. Sax*, 7 Cow. 95. The court there said: "The rule in case of a wrongful taking is, that the taker can not, by any act of his own, acquire title, unless he either destroy the identity of the thing; as by changing money into a cup, or grain into malt; or annexing it to and making it a part of some other thing, which is the principal; or changing its nature from personal to real property; as where it is worked into a dwelling-house."

In the present case, the nature and species of the commodity was entirely changed and its identity destroyed; as effectually, it seems to me, as by "making wine, oil, or bread, out of another's grapes, olives, or wheat." I think the circuit judge erred in nonsuiting the plaintiffs, and that they are entitled to a new trial.

New trial granted.

TITLE BY ACCESSION.—In the case of *Peirce v. Goddard*, 33 Am. Dec. 764, it was decided that a willful trespasser can acquire no right by accession, to the property of another, and that the owner may reclaim it notwithstanding any alteration of form, unless it be changed into a different species and become incapable of restoration to its original state. See the note to that case, p. 766, and other cases there collected. The principal case was cited in *Campbell v. Erie R'y Co.*, 46 Barb. 556, to the point that the right to retake property wrongfully taken is only lost when its identity is destroyed. When the case went back to the lower court for retrial, the defendants offered to prove that the whisky was manufactured from corn belonging to Wood, the defendant in the execution; that the plaintiffs had taken the corn and manufactured it into whisky, without any authority from Wood, and knowing at the time that it belonged to him. The plaintiffs objected to this evidence, insisting that Wood's title to the corn was extinguished by its conversion into whisky. The evidence was rejected, and the plaintiffs had a verdict, which the supreme court, in 4 Denio, 332, refused to set aside. The case was then brought to the court of appeals, where the judgment of the supreme court was reversed, 3 N. Y. 379, the majority of the court holding that where corn is taken from the owner by a willful trespasser and by him converted into whisky, the property is not thereby changed, but remains in the original owner. See note to *Baker v. Wheeler*, 24 Am. Dec. 70, 86.

BROWN v. BUTCHERS AND DROVERS' BANK.

[6 HILL, 443.]

INDORSEMENT WRITTEN IN PENCIL, OR MADE BY A MARK, is sufficient, although it appears that the party making the mark could write. And where a person writes the figures "1. 2. 8." on the back of a bill of exchange, as a substitute for his name, intending thereby to bind himself as indorser, he will be so bound.

ERROR to the superior court of New York city. The bank sued Brown as indorser of a bill of exchange, and recovered judgment. The indorsement was made with a lead pencil, and in the figures "1. 2. 8." The court below charged the jury, that if they believed the figures were made by Brown as a substitute for his proper name, and that he intended thereby to bind himself as indorser, he was liable. The jury found for the plaintiff, and Brown thereupon brought error.

C. De Witt, for the plaintiff in error.

A. Schell, for the defendants in error.

By Court, NELSON, C. J. It has been expressly decided that an indorsement written in pencil is sufficient: *Geary v. Physic*, 5 Barn. & Cress. 234; and also that it may be made by a mark: *George v. Surrey*, 1 Moo. & M. 516. In a recent case in the king's bench, it was held that a mark was a good signing within the statute of frauds; and the court refused to allow an inquiry into the fact whether the party could write, saying that would make no difference: *Baker v. Dening*, 8 Ad. & El. 94; and see *Harrison v. Harrison*, 8 Ves. 186; *Addy v. Grix*, Id. 504. These cases fully sustain the ruling of the court below. They show, I think, that a person may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name, and he intend to bind himself.

Judgment affirmed.

CITED in *Barnard v. Heydrick*, 2 Abb. (N. S.) 52, and in *Patchin v. Ritter*, 27 Barb. 40, to the point that a party may, in ordinary business transactions, become bound by any mark or design he thinks proper to adopt and use for his name. And to the point that figures or a mark may be used instead of a proper name, and where either is substituted by a party intending thereby to bind himself, the signature is effective to all intents and purposes, in the following cases: *Palmer v. Stephens*, 1 Denio, 479; *Brainerd v. Heydrick*, 32 How. Pr. 101; *McIntire v. Preston*, 5 Gilm. 66; *Hascall v. Life Assn. of America*, 5 Hun, 155; *DeWitt v. Walton*, 9 N. Y. 573; *David v. Williamsburgh City F. Ins. Co.*, 83 Id. 269; *Zann v. Haller*, 71 Ind. 139. It is also distinguished in *Ferris v. Kilmer*, 48 N. Y. 303.

NOWLEN v. COLT.

[6 HILL, 461.]

MINGLING WHEAT BELONGING TO TWO PERSONS IN COMMON BIN, with the knowledge and assent of both, makes them tenants in common, and if one of them disposes of the whole without the authority of the other, he is liable in trover.

TROVER for a quantity of wheat. The plaintiff delivered the wheat in question to the defendant, who put it into a bin with other wheat belonging to himself, with the knowledge and consent of the plaintiff. The defendant sold the whole of the wheat, and received payment for it. The judge charged the jury that if the wheat of two persons is mixed together with their knowledge and consent, and either afterwards carries away and disposes of the whole, an action of trover may be maintained against him. The jury found for the plaintiff, and the defendant moved for a new trial on a bill of exceptions.

A. Taber, for the defendant.

J. Young, for the plaintiff.

By Court, NELSON, C. J. I am of opinion that the ruling of the learned judge was correct. Mingling the wheat in a common bin, with the knowledge and assent of both parties, made them tenants in common; and the disposal of the entire mass by one of the co-tenants subjected him to this action. Inst., lib. 2, tit. 1, sec. 28; Vin. Abr., tit. Property (E); *White v. Osborn*, 21 Wend. 72.

New trial denied.

SALE OF COMMON PROPERTY BY ONE CO-TENANT renders him liable in trover or trespass: *Rains v. McNairy*, 40 Am. Dec. 651, and note 653, where other cases are collected. See also *Sanborn v. Morrill*, Id. 701. The principal case is cited in *Green v. Edick*, 66 Barb. 567, and in *Small v. Robinson*, 9 Hun, 420, in support of the proposition that the conversion by one tenant in common to his own use, of the whole of the joint property, or the sale or destruction thereof in defiance and denial of the rights of his co-tenant, is such a conversion as will sustain an action of trover; it is also cited in *Wilson v. Nason*, 4 Bosw. 167, to the point that if wheat of two persons is mixed together with their knowledge and consent, and either carries away or disposes of the whole, trover may be maintained against him.

COOK v. ELLIS.

[6 HILL, 466.]

CONVICTION AND PUNISHMENT FOR COMMISSION OF ASSAULT do not bar a civil suit against the offender for the same act, nor prevent the recovery of exemplary damages against him in such suit.

TRESPASS for assault and battery. The opinion states the case.

G. A. Simmons, for the defendant.

L. Stetson, for the plaintiff

By COURT. This action is for an assault made upon the plaintiff with intent to have carnal connection with her. It is not denied that there were circumstances in proof which authorized the jury to give exemplary damages, had not the defendant been convicted and fined two hundred and fifty dollars for the same assault, which he had paid. This, it is insisted, barred all claim beyond the actual damages. The judge charged that the criminal proceedings did not prevent the jury from giving exemplary damages, if they chose; though the fine and payment were proper to be considered in fixing the amount which they would allow the plaintiff. We have examined the several authorities cited on the part of the defendant, and find none of them so favorable to him as the learned judge was in this case, unless, indeed, a remark in 1 Chit. Gen. Pr. (p. 17, Am. ed. of 1834), forms an exception. But the author does not pretend to be sustained by any adjudged case, at least he cites none; and we think he is mistaken. In vindictive actions—and this is agreed to come within that class—jurors are always authorized to give exemplary damages where the injury is attended with circumstances of aggravation; and the rule is laid down without the qualification that we are to regard either the possible or the actual punishment of the defendant by indictment and conviction at the suit of the people. That the criminal suit is not a bar to the civil, and that no court will drive the prosecutor to elect between them, if the former be by indictment, is entirely settled: *Jones v. Clay*, 1 Bos. & Pul. 191; *Jacks v. Bell*, 3 Car. & P. 316. He may proceed by both at the same time: *Id.*; nor will the court even stay proceedings in the civil action, to govern themselves by the event of a pending criminal prosecution: *Caddy v. Barlow*, 1 Man. & R. 275.

We concede that smart money allowed by a jury, and a fine imposed at the suit of the people, depend on the same principle. Both are penal, and intended to deter others from the

commission of the like crime. The former, however, becomes incidentally compensatory for damages, and at the same time answers the purposes of punishment. The recovery of such damages ought not to be made dependent on what has been done by way of criminal prosecution, any more than on what may be done. Nor are we prepared to concede that either a fine, an imprisonment, or both, should be received in evidence to mitigate damages. True, if excluded, a double punishment may sometimes ensue; but the preventive lies with the criminal rather than the civil courts.

The former have ample power, if they choose to exert it, of preventing any great injury from excess of punishment. In a proper case, if the party aggrieved will not release his private injury or stipulate to waive a suit for it, or at least to waive all claim for smart money, the court may, after conviction, either impose a fine merely nominal, or stay proceedings till a trial shall be had in the civil action, and govern themselves accordingly in the final infliction of punishment. This, or something equivalent, has often been done. The more usual case in England is, where the party comes as the principal actor in the prosecution by way of applying for a criminal information, that the court will then make it a condition that he shall waive his right of action: *Rex v. Sparrow*, 2 T. R. 198; see also *Rex v. Fielding*, 2 Burr. 654; S. C., 2 Keny. 386. Indeed, so common has this become, that the very application by the party is said to be considered as an implied stipulation not to bring a private suit. This will therefore be stayed: *Id.*; Tidd's Pr. 9, Am. ed. 1840. And even where he proceeds by indictment, the court often, in effect, turn over the whole case to be disposed of by action, in the method before mentioned. The more usual course is to stay proceedings on the criminal side, till those on the civil side are at an end: *Commonwealth v. Bliss*, 1 Mass. 32; *Commonwealth v. Elliott*, 2 Id. 372. This is not done with us till after conviction: *The People v. General Sessions of Genesee*, 13 Johns. 84; and such is no doubt the better practice.

In *Jacks v. Bell*, 3 Car. & P. 316, the party had received, on the certificate of the judges, a portion of several fines, amounting to more than the actual damage he had sustained by the assault. This was pursuant to the practice mentioned in 1 Chit. Cr. L. 8, 810. In a civil action, therefore, Lord Tenterden, C. J., directed a verdict for one farthing only, saying that no certificate for the sum received would have been given by the court, unless it had been with the understanding that no action

was to be brought. The judges might, without doubt, have prevented an action entirely, had they required a release or stipulation as the condition of their certificate. The damages were properly mitigated, because the party had actually got his full compensation. It is believed that no case goes further; and even this would not authorize the jury to notice what fine may have been paid to the people. Of that, the party gets nothing. The judges in this country are not authorized to give it to him.

On the whole, we are of opinion that the charge was quite as favorable to the defendant as he could possibly claim, not to say more so.

New trial denied.

EXEMPLARY DAMAGES FOR INJURIES CAUSED BY CRIMINAL ACTS: See note to *Merrills v. Tariff Man. Co.*, 27 Am. Dec. 687.

THE PRINCIPAL CASE IS CITED IN *Bailey v. Dean*, 5 Barb. 304, and in *Taylor v. Church*, 8 N. Y. 462, to the point that where a defendant may be indicted for the same offense, the fact that he has been indicted and has satisfied the penalty of the law, can not be shown for the purpose of avoiding or mitigating the penal character of a verdict in a civil suit; in *Fry v. Bennett*, 1 Abb. 307; S. C., 4 Duer, 265, to the point that a civil action is not stayed or affected by a criminal prosecution for the same offense; and in *Adams v. Rivers*, 11 Barb. 398; *Kiff v. Youmans*, 20 Hun, 125; *Valtz v. Blackmar*, 64 N. Y. 444, to the point that in an action of trespass, with circumstances of aggravation, the jury are not limited to mere compensatory damages.

BAYLEY ET AL. v. ONONDAGA COUNTY MUT. INS. Co.

[6 HILL, 476.]

BOND PAYABLE TO DIRECTORS OF COMPANY, THEIR SUCCESSORS OR ASSIGNS, is in legal effect made to the company, which may maintain an action thereon in its corporate name.

DECLARATION ON BOND MADE TO DIRECTORS OF COMPANY ought to allege that it was made to them by the name and description of the directors of the company; but after verdict or judgment by default, the declaration will be sufficient without such an averment.

SUIT SHOULD BE BROUGHT IN NAME OF PRINCIPAL, and not in that of the agent, where on the face of the contract it purports to have been made by or with an agent having no direct or beneficial interest in the transaction.

WRITTEN CONTRACT SHOULD, IN PLEADING, BE SET OUT according to its legal effect; but where its true meaning is doubtful, it is best to set it out *in hæc verba*, and leave the court to construe it.

ERROR to the Onondaga common pleas. The Onondaga County Mutual Insurance Company brought an action of debt against Bayley and Minard upon a bond, and in their declaration al-

leged that they did acknowledge themselves to be held and firmly bound unto the directors of the said company in the sum of one thousand dollars, which was to be paid to the said directors, or their successors or assigns. After judgment by default was duly entered, the defendants brought error.

B. D. Nowon, for the plaintiffs in error.

J. R. Lawrence, for the defendants in error.

By Court, NELSON, C. J. The ground of error relied on is, that no right or title is shown in the plaintiffs below; the obligation being to the directors of the company. If the declaration had been drawn in a lawyer-like manner, it would have contained an averment that the bond was made to the plaintiffs, by the name and description of the "directors of the Onondaga County Mutual Insurance Company." But I am satisfied the declaration is sufficient, after verdict or judgment by default, without this averment. The board of directors, being the known legal agents of the corporation, are to be regarded as its representatives in all their official acts and doings. *Sess. L. of 1836*, p. 177; *Id.*, p. 43, sec. 3. They are to be so regarded upon this record: and then the rule applies that where a contract purports on its face to have been made by or with an agent, having no direct or beneficial interest in the transaction, the suit must be brought in the name of the principal, as the contract is in legal effect made with him, and not with the agent: 1 *Chit. Pl.* 7, *Am. ed. of 1840*. The case of *Pigott v. Thompson*, 3 *Bos. & Pul.* 147, exemplifies the rule. There certain persons named were appointed commissioners for draining lands, with power to erect toll-gates and take tolls, and the tolls were vested in the commissioners and their successors. They let the tolls to the defendant for three years, who signed a writing acknowledging the hiring at one hundred and forty-five pounds per annum, "to be paid to the treasurer of the commissioners," etc.; and the question was, whether the rent could be recovered in the name of the treasurer. The court held that the contract was in legal effect with the commissioners, and that the action should have been brought in their name. In *Gilmore v. Pope*, 5 *Mass.* 491, the plaintiff sought to recover certain assessments made upon shares in a turnpike company, subscribed for by the defendant; and the promise in the subscription paper was, to pay the assessments to John Gilmore, the agent of the company, in whose name the action was brought. The court nonsuited the plaintiff, holding that the agent could not sue, and that the

action should have been brought in the name of the corporation. Afterwards an action was brought on the same subscription paper, in the name of the company, and it was sustained: *Taunton and South Boston Turnpike Company v. Whiting*, 10 Mass. 327 [6 Am. Dec. 324]; and see Lawes on Pl. 100, 312.

As a general rule, a written contract should be set out in pleading according to its legal effect; but where the true meaning is doubtful, it is most advisable to set out the contract *in hæc verba*, and leave the court to construe it: 1 Chit. Pl. 306, 307; *Ross v. Parker*, 1 Barn. & Cress. 358; *Moore v. Earl of Plymouth*, 3 Barn. & Ald. 66, 69, 70. In this case, the legal operation and effect of the bond are sufficiently obvious, though I admit the count would have been more scientific if the averment already mentioned had been made. But the court can not fail to see, upon the face of the record, that the obligation is to the plaintiffs, by the name of their directors, the legally constituted agents of the corporation. I am satisfied that the plaintiffs show a sufficient title to sustain the suit upon the bond, and that there is no foundation for the writ of error.

Judgment affirmed.

In *Taunton Turnpike Corporation v. Whiting*, 6 Am. Dec. 124, it was held that a corporation might maintain an action of *assumpsit*, in its own name, on a promise made to its agent.

THE PRINCIPAL CASE IS CITED in *Considerant v. Brinsbane*, 2 Bosw. 479, to the point that where, although the agent's name appears in a contract, it is accompanied by such designation of the official or representative character in which he is named as promisee that the promise was, in judgment of law, taken to the promisee and not to himself, then, and in such cases, the contract can not be said to be made in his name; in *Grinnell v. Buchanan*, 1 Daly, 543, to the point that if a promise is made to A. for the benefit of B., and an action is brought by B., the promise actually made to A. may be given in evidence under the declaration; in *Curwin v. Fanning*, 13 Hun, 466, in *Curran v. Sears*, 2 Redf. 532, and in *Baldwin v. Bank of Newbury*, 1 Wall. (U. S.) 242, to the point that a bond executed to the directors of a company, to be paid to them, their successors and assigns, is, in legal effect, made to the company; in *New York Instn. for the Blind v. How's Ex'rs*, 10 N. Y. 92, and in *Chamberlain v. Chamberlain*, 43 Id. 437, to the point that a bequest to the trustees of an institution is a bequest to the institution itself, and in *Considerant v. Brinsbane*, 22 N. Y. 400, to the point that where a contract purports on its face to have been made by or with an agent having no direct or beneficial interest in the transaction, a suit thereon must be brought in the name of the principal, as the contract is in legal effect made with him.

WHEN PRINCIPAL MAY SUE ON CONTRACT MADE BY AGENT: See note to *Beesee v. Robert*, 27 Am. Dec. 137, and cases there cited; also *Townsend v. Goewey*, 32 Id. 514, note 517, and cases cited.

ROOT v. LOWNDES.

[6 HILL, 512.]

PLAINTIFF IN ACTION OF SLANDER, MAY SHOW REPETITION of the actionable words, although there be but one count in the declaration; but he will not be allowed, in doing so, to prove any words that might be the subject of another action.

SLANDER. The declaration contained three counts; and after the plaintiff had proved slanderous words spoken on three different occasions, she was permitted to prove slanderous words spoken at other times, some of which were not laid in the declaration. There was a verdict for the plaintiff, and the defendant moved for a new trial on a bill of exceptions. The other facts appear from the opinion.

H. Hogeboom, for the defendant.

K. Miller and S. Stevens, for the plaintiff.

By Court, BRONSON, J. When the plaintiff does not go beyond the words laid in the declaration, I see no reason why he may not show that those words have been spoken on a dozen different occasions, although there may be but one count in the declaration. If the defendant has told twenty persons, at as many different times, that the plaintiff is a thief, it can not be necessary to insert twenty counts, precisely alike, for the purpose of enabling the plaintiff to prove all the conversations. Allowing the proof, can work no injury to the defendant. He is advised by the declaration what words the plaintiff intends to give in evidence; and whether all the different occasions of speaking them are proved or not, the judgment will be a bar to another action. In *Defries v. Davis*, 7 Car. & P. 112, Chief Justice Tindal said, he would receive evidence of a repetition of the same words, though he would not allow the plaintiff to prove any words which might be the subject of another action. The declaration in that case contained but a single count. The practice at the circuits in this state has been to admit evidence of a repetition of the same words, without any reference to the number of counts in the declaration; and there is no sound principle upon which it can be rejected.

But very different considerations arise when we come to actionable words which are not laid in the declaration. To admit the proof of such words must be a surprise upon the defendant. It can not be supposed that he will be prepared to try a matter of which the plaintiff has not complained. That

is not all. If the plaintiff may prove the words, the defendant may justify as to those words; and thus the court and jury will be led off from the point in controversy as presented by the pleadings, into the trial of an indefinite number of collateral issues. But what is still worse, the plaintiff will be allowed to recover damages for an injury, when the recovery will not be a bar to another action for the same cause. I know it is said, that the judge must tell the jury not to give damages for the words which are not laid in the declaration. But suppose he does give that instruction, everybody knows that it will have little or no effect. However honestly the jury may intend to follow the guidance of the court, it requires but a moderate acquaintance with the operations of the human mind to see that they will be misled by the introduction of such evidence. If, after proving the words laid, imputing larceny, the plaintiff is allowed to prove other words imputing robbery or murder, it is past all doubt that the latter words, whatever the judge may say to the contrary, will influence the jury in fixing the *quantum* of damage. This has been admitted by those who have received such evidence. To tell the jury at one moment that the evidence is proper, and at the next, that they must disregard it, involves a contradiction; and if the jury is composed of sensible men, they will either think lightly of the law, or of those who administer it. But whatever they may think, they will give damages for the words not laid; and thus the defendant may suffer a double punishment for the same fault.

It is said that the proof is admissible to show the defendant's malice in speaking the words laid. But if those words are defamatory, malice is implied, and no extrinsic evidence of its existence can be necessary. And if the words laid are not defamatory, proof of express malice will not make them so. The only case where extrinsic evidence of malice can be necessary, is where the occasion of speaking the words shows that they are *prima facie* excusable; as in giving confidential advice, answering to inquiries concerning the character of a servant, or making some other privileged communication.

The English cases upon this subject are collected in 2 Ph. Ev. 245-247, ed. of 1839. They are all *nisi prius* decisions, and are not sufficiently uniform to give them much weight in point of authority. The most recent cases show that the judges are disposed to stand on the ground of principle, and try nothing but the issue which the parties have made by their pleadings. In *Finnerty v. Tipper*, 2 Camp. 72, which was an action for a

libel, Sir James Mansfield, C. J., would not permit the plaintiff to read other libels for the purpose of proving malice, unless they expressly referred to the one on which the action was founded. The plaintiff's counsel pressed the point, saying that the other publications were not offered as part of the present action nor to aggravate the damages. But the judge adhered to his opinion, and said the necessary consequence of admitting the evidence would be, that the jury would give damages for the second libel in an action for the first. In *Stuart v. Lovell*, 2 Stark. 93, Lord Ellenborough rejected evidence of subsequent publications. He said they would be admissible to show the intention of the defendant, if it were at all equivocal; but not for the purpose of enhancing the damages. *Defries v. Davis*, 7 Car. & P. 112, which is the last case on the subject I have seen, was an action for verbal slander; and the plaintiff proposed to prove other words subsequently spoken. Tindal, C. J., told the counsel they might show anything that was evidence of malice; but must not show anything that might be the subject of another action. There can be no good reason for allowing other words to be given in evidence, unless they are necessary to explain or give point to those on which the action is founded.

This court has paid too much deference to the early *nisi prius* decisions in England. In *Thomas v. Crowell*, 7 Johns. 264 [5 Am. Dec. 269], which was an action for a libel, the plaintiff was allowed to give in evidence other publications by the defendant to show malice; and a new trial was denied. But Spencer, J., who delivered the opinion of the court, said it had not been objected that those publications were libelous. He added, that it would be incorrect to suffer distinct libelous matter to be given in evidence; for though the judge might instruct the jury not to give damages for such libels, yet it would imperceptibly influence their judgments as to the damages, and thus the defendant might be twice punished for the same offense. In *Inman v. Foster*, 8 Wend. 602, the plaintiff was allowed to prove other slanderous words, on the ground that the statute of limitations had run as to those words. That was less objectionable than to allow the proof where, as in this case, the statute had not run, and an action might still be brought. And yet it was wrong in point of principle to admit the evidence. It was indirectly giving the plaintiff the benefit of an action which he had lost; for no one will deny that the jury would give damages for the old slander, as well as for that charged in the declaration.

It will be apparent, on reading the case, that the late chief justice went against the convictions of his own judgment, feeling himself bound by the early *nisi prius* cases, which are no longer regarded as good law in England. At the most, we are only committed to this extent: In actions for libel, the plaintiff may give in evidence other publications which are not libelous; and in actions for verbal slander, the plaintiff may prove other slanderous words, where the statute of limitations has run as to those words. Whether these two cases ought to be followed, we are not now called upon to say. But clearly we ought not to go a single step beyond what has already been decided. In this case, the statute of limitations had not run upon any of the slanderous words which the plaintiff was allowed to prove.

The charge was clearly wrong. The jury was told that the slanderous words not laid in the declaration were proper to be considered for the purpose of enhancing the damages. The instruction should have been directly the other way. All the judges who have held such evidence admissible, have held, also, that the jury should be instructed not to give damages for the words not laid in the declaration. There are other difficulties in the case; but they may, perhaps, be obviated on another trial.

New trial granted.

EVIDENCE OF REPETITION OF SLANDER, WHEN ADMISSIBLE: See *McIntire v. Young*, 39 Am. Dec. 443, note 448.

THE PRINCIPAL CASE IS CITED in *Vallance v. King*, 3 Barb. 551, and in *Bush v. Prosser*, 11 N. Y. 359, to the point that the same words, in an action of slander, may be proved to have been repeated although laid in a single count only; in *Rundell v. Butler*, 7 Barb. 261, and *Howard v. Sexton*, 4 N. Y. 160, to the point that actionable words not counted upon, can not be given in evidence; in *Bassil v. Elmore*, 65 Barb. 631, to the point that where a complaint contains but one count, only one slanderous charge can be proved; in *Gray v. Nellis*, 6 How. 292, and in *Distin v. Rose*, 69 N. Y. 125, to the point that a repetition of the same words may be proved for the purpose of showing malice; and in *Frasier v. McCloskey*, 60 Id. 338, to the point that a plaintiff is never permitted to give in evidence words which might be the subject of another action.

CRAIN v. PETRIE.

[6 HILL, 522.]

TO MAINTAIN ACTION FOR SPECIAL DAMAGES, IT MUST BE SHOWN that they proceeded wholly and exclusively from the injury complained of, and not from the wrongful act of a third party remotely induced thereby.

IN ACTION FOR SELLING TO BUTCHER DISEASED SHEEP AS SOUND, evidence that a third party who had contracted with the plaintiff to purchase mutton from him refused to perform such contract in consequence of a report that the plaintiff had purchased diseased sheep from the defendant, is not admissible for the purpose of showing special damages; nor is evidence that other customers refused, for the same reason, to buy mutton from him, admissible for that purpose.

ERROR to the Herkimer common pleas, where Petrie sued Crain for deceit in the sale of sheep. The plaintiff below was a butcher, and bought the sheep in question for the purpose of killing them for market. The fraud complained of was that the sheep were diseased, and that the defendant, knowing the fact, sold them as healthy. The plaintiff was allowed, against the defendant's objection, to show that one Gage, who had agreed to take the hams and shoulders of the sheep which the plaintiff might slaughter during a certain period, had refused to fulfill his agreement in consequence of a report that the plaintiff had purchased diseased sheep from the defendant, and also that others had refused to buy mutton from him, in consequence of the same report. The jury found for the plaintiff, and the defendant brought error.

J. A. Spencer, for the plaintiff in error.

D. Burwell, for the defendant in error.

By Court, NELSON, C. J. The court below clearly erred upon the question of damages. The consequential loss which the plaintiff was allowed to prove at the trial, was too remote and speculative to come within any established rule on the subject. To maintain a claim for special damages, they must appear to be the legal and natural consequences arising from the tort, and not from the wrongful act of a third party remotely induced thereby. In other words, the damages must proceed wholly and exclusively from the injury complained of: 1 Chit. Pl. 395, 396; 1 Saund. Pl. and Ev. 344; *Morris v. Langdale*, 2 Bos. & Pul. 284, 289; *Vicars v. Wilcocks*, 8 East, 1, 3, 4.

This rule was violated by the court below, first, in admitting evidence of the refusal of Gage to receive and sell good and well-cured hams, shoulders, etc., contrary to a previous arrangement with him, in consequence of the reports that the plaintiff had purchased a lot of diseased sheep of the defendant; and second, in admitting evidence that others at Little Falls had refused to purchase, for the like reason, any hams, etc., that came from the plaintiff's establishment. The damages first mentioned, if any, arose out of a wrongful breach of con-

tract, for which the plaintiff was entitled to an adequate remedy against Gage; and the others resulted from a want of confidence in the care, skill, or integrity of the plaintiff himself, the people assuming that he might sell the meat of diseased sheep for a good and merchantable article.

Judgment reversed.

CONSEQUENTIAL DAMAGES: See *Blanchard v. Ely*, 34 Am. Dec. 250, note 257, and the cases there cited and collected.

THE PRINCIPAL CASE IS CITED in *Walrath v. Redfield*, 11 Barb. 371, and in *Hicks v. Foster*, 13 Id. 685, to the point that damages must always be the natural and proximate consequence of the act complained of; in *Hoard v. Peck*, 56 Id. 207, and in *Kendall v. Stone*, 5 N. Y. 19, to the point that to maintain an action for special damages, it must be shown that they proceeded wholly from the injury complained of; in *Rider v. Fuller*, 13 Hun, 670, and in *Ryan v. N. Y. Cent. R. R. Co.*, 35 N. Y. 211, to the point that damages must proceed exclusively from the act complained of; and in *People v. Mayor etc. of Albany*, 5 Lans. 529; in *Tervilliger v. Wanda*, 17 N. Y. 57; in *Lavery v. Western Union Tel. Co.*, 60 Id. 202; and in *Chicago & R. I. R. R. Co. v. Ward*, 16 Ill. 527, to the point that, in legal contemplation, immediate and not remote causes of damage are considered.

HAWKINS v. HOFFMAN.

[6 HILL, 586.]

COMMON CARRIER IS LIABLE IN TROVER FOR GOODS LOST BY HIS ACT, though without any intentional wrong on his part; but trover will not lie for the mere omission of the carrier. The remedy in such a case is *assumpsit*, or a special action on the case.

DEMAND AND REFUSAL ARE ONLY EVIDENCE OF CONVERSION where the defendant was in a condition to deliver the property if he would.

AGREEMENT TO CARRY PASSENGER'S ORDINARY BAGGAGE IS IMPLIED in the contract to carry the passenger himself, but the implication can not be extended a single step beyond such things as the traveller usually has with him as a part of his luggage.

TERM BAGGAGE DOES NOT INCLUDE SAMPLES OF GOODS carried in a trunk for the purpose of carrying on traffic as a merchant.

WHETHER MONEY TO MEET TRAVELING EXPENSES, carried in a passenger's trunk, is included in the term baggage, query.

ACTION on the case. The plaintiff declared against the defendant as a common carrier, and complained of the loss of his trunk and its contents. There was also in the declaration a count in trover. The plaintiff was a merchant, and employed one Mason as a traveler, whom he furnished with samples of the goods which he had for sale. Mason took passage on a steamboat belonging to the defendant, having with him a trunk

containing samples of goods belonging to the plaintiff. During the journey the trunk was lost. The judge, on the trial, ordered a nonsuit, which the plaintiff now moved to set aside.

H. P. Hastings, for the plaintiff.

E. Hoffman, for the defendant.

By Court, BRONSON, J. Trover will lie where the goods have been lost to the owner by the act of the carrier, though there may have been no intentional wrong; as where the goods are by mistake, or under a forged order, delivered to the wrong person: *Youl v. Harbottle*, Peak. Cas. 49; *Devereux v. Barclay*, 2 Barn. & Ald. 702; *Stephenson v. Hart*, 4 Bing. 476; *Lubbock v. Inglis*, 1 Stark. 104. But it will not lie for the mere omission of the carrier; as where the property has been stolen or lost through his negligence, and so can not be delivered to the owner. The remedy in such cases is *assumpsit*, or a special action on the case: *Anon.*, 2 Salk. 655; *Ross v. Johnson*, 5 Burr. 2825; and see *Dewell v. Moxon*, 1 Taunt. 391; 2 Saund. 47, f; *McCombie v. Davies*, 6 East, 538. Mere non-feasance does not work a conversion of the property; and although the owner may have another action, he can not maintain trover. Here, the trunk was lost, and the plaintiff can only recover, if at all, upon the counts which charge the defendant as a carrier. A demand and refusal would not alter the case, for as the trunk was either stolen or lost, the defendant could not deliver it. Demand and refusal are only evidence of a conversion where the defendant was in such a condition that he might have delivered the property if he would. If the defendant was a common carrier of the lost trunk, it would then be important to inquire whether there was a complete delivery of the property to Mason at Poughkeepsie. If there was a full transfer from the custody of the boatmen to the charge of the owner, the defendant's contract was performed, and he was no longer answerable for the property as a common carrier. But although the evidence tended pretty strongly to show a complete delivery, I do not think it so conclusive as to warrant the judge in taking the question from the jury, if the cause turned upon that point. He undoubtedly went upon the ground that the defendant was not to be regarded as a common carrier of the trunk; and that is the principal question in the cause.

Although I do not find it stated in the case that Mason paid anything to the boat-owner, either for freight or passage, yet the whole argument, on both sides, went upon the ground that

he had paid the usual fare of a passenger, and nothing more: that he neither paid, nor intended to pay anything for the trunk; but designed to have the same pass as his baggage. It was formerly held, that the owner of the boat or vehicle was not answerable as a carrier for the luggage of the passenger, unless a distinct price was paid for it. But it is now held that the carrying of the baggage is included in the principal contract in relation to the passenger; and the carrier is answerable for the loss of the property, although there was no separate agreement concerning it. A contract to carry the ordinary baggage of the passenger is implied from the usual course of the business; and the price paid for fare is considered as including a compensation for carrying the freight. But this implied undertaking has never been extended beyond ordinary baggage, or such things as a traveler usually carries with him for his personal convenience in the journey. It neither includes money, nor merchandise: *Orange County Bank v. Brown*, 9 Wend. 85 [24 Am. Dec. 129]; *Pardee v. Drew*, 25 Id. 459.

It was suggested in the first case, that money to pay traveling expenses might, perhaps, be included. But that may, I think, be doubted. Men usually carry money to pay travel expenses about their persons, and not in their trunks or boxes; and no contract can be implied beyond such things as are usually carried as baggage. It is going far enough to imply an agreement to carry freight of any kind from a contract to carry the passenger; for the agreement which is implied is much more onerous than the one which is expressed. The carrier is only answerable for an injury to the passenger, where there has been some want of care or skill; but he must answer for the loss of the goods, though it happened without his fault. Still, an agreement to carry ordinary baggage may well be implied from the usual course of business; but the implication can not be extended a single step beyond such things as the traveler usually has with him as a part of his luggage. It is undoubtedly difficult to define with accuracy what shall be deemed baggage within the rule of the carrier's liability. I do not intend to say that the articles must be such as every man deems essential to his comfort; for some men carry nothing, or very little with them when they travel, while others consult their convenience by carrying many things. Nor do I intend to say that the rule is confined to wearing apparel, brushes, razors, writing apparatus, and the like, which most persons deem indispensable. If one has books for his instruction or amusement by the way, or

carries his gun or fishing tackle, they would undoubtedly fall within the term baggage, because they are usually carried as such. This is, I think, a good test for determining what things fall within the rule.

In this case the plaintiff sent out Mason as his "traveler" or agent to seek purchasers for his goods, and the trunk in question contained samples of the merchandise which he wished to sell. The samples were not carried for the personal use, convenience, instruction, or amusement of the passenger in his journey; but for the purpose of enabling him to make bargains in the way of trade. Although the samples were not themselves to be sold, they were used for the sole purpose of carrying on traffic as a merchant. They were not baggage within the common acceptance of the term; and as they were not shipped or carried as freight, the judge was right in holding that the plaintiff could not recover.

New trial denied.

LIABILITY OF COMMON CARRIER FOR LOSS OF GOODS: See *Gilmore v. Carman*, 40 Am. Dec. 96, note 100; *Hale v. N. J. S. N. Co.*, 39 Id. 398, note 406, where other cases in this series are collected; *Relf v. Rapp*, 37 Id. 528.

LIABILITY OF CARRIER FOR LOSS OF PASSENGER'S BAGGAGE: See *Hollister v. Nowlen*, 32 Am. Dec. 455, note 468.

DEMAND IN ACTION OF TROVER is only evidence of a conversion, and not necessary to be proven where there is an actual conversion: *Houston v. Dyche*, 33 Am. Dec. 130, note 131, where other cases are collected.

THE PRINCIPAL CASE IS CITED in the following cases to these points: in *Wilkins v. Earle*, 19 Abb. 196, that everything destined for the use, personal convenience, and even instruction or amusement of a passenger, is included in the baggage for the safe transfer of which a carrier is liable; in *Macklin v. N. J. S. Co.*, 7 Abb. (N. S.) 238, that carriers must answer for loss of a passenger's baggage, although it happened without their fault; in *Blanchard v. Isaacs*, 3 Barb. 389, that by the term baggage is meant articles of necessity or personal convenience, but not merchandise; in *Willard v. Bridge*, 4 Id. 367, that where property is lost by the mere omission of a common carrier, he is not liable for conversion, but upon his contract of bailment; in *Kent v. Hudson River R. R. Co.*, 22 Id. 292, in *Briggs v. N. Y. Cent. R. R. Co.*, 23 Id. 522, and in *Ryerson v. Kentfield*, 6 Hun, 388, that mere delay in delivery is not a conversion by the carrier; in *Bowman v. Eaton*, 24 Barb. 532, and in *Whitney v. Slauson*, 30 Id. 278, that refusal to comply with demand is only evidence of a conversion where ability to comply with it, at the time, is proved; in *Glasco v. N. Y. Cent. R. R. Co.*, 36 Id. 561, in *Needles v. Howard*, 1 E. D. Smith, 60, in *Fairfax v. N. Y. Central R. R. Co.*, 37 Supr. Ct. 523, and in *Hopkins v. Westcott*, 6 Blatchf. 69, that an undertaking to carry a passenger implies an agreement to carry with him such articles as are usually considered baggage; in *Chamberlain v. Western Trans. Co.*, 45 Barb. 223, in *Richards v. Westcott*, 2 Bosw. 604, in *Grant v. Newton*, 1 E. D. Smith, 99, in *Jordan v. Fall River R. R. Co.*, 5 Cush. 72, in *Stimson v. Connecticut River*

R. R. Co., 38 Mass. 84, and in *Pinkerton v. Woodward*, 33 Cal. 604, that neither money nor articles or samples of merchandise can be properly included under the term baggage; in *Nevins v. Bay State S. Co.*, 4 Bosw. 234, that an implied undertaking to carry baggage is not extended beyond ordinary baggage; in *Davis v. Cayuga & S. R. R. Co.*, 10 How. 332, in *Sloman v. Great W. R. Co.*, 13 Hun, 547, and in *Wilkins v. Earl*, 3 Rob. (N. Y.) 363, that a carrier is not liable for samples of goods carried in a passenger's trunk in *Scovell v. Griffith*, 12 N. Y. 515, that something more than mere omission was required in order to maintain trover under the former system; and *McEntee v. N. J. S. Co.*, 45 N. Y. 38, in *Bailey v. Hudson River R. R. Co* 49 Id. 78, in *Mattison v. N. Y. Cent. R. R. Co.*, 57 Id. 557, in *Ontario Bas v. N. J. S. Co.*, 59 Id. 514, in *Matteson v. N. Y. Cent. & H. R. R. Co.*, 76 Id. 384, and in *Bowlin v. Nye*, 10 Cush. 418, that a wrongful delivery of goods by a common carrier, is treated as a conversion.

BROWN v. MAXWELL.

[6 HILL, 592.]

PLAINTIFF SUING FOR NEGLIGENCE, MUST HIMSELF BE WITHOUT FAULT; and the fact that he is an infant, does not prevent the application of this rule.

MASTER IS NOT LIABLE TO SERVANT FOR NEGLIGENCE OF FELLOW-SERVANT engaged in a particular business, although the latter be the foreman in charge of it.

ERROR to the mayor's court of the city of Troy. The action was originally commenced by Maxwell, an infant, against Brown, in the justices' court. Judgment was there given in favor of the plaintiff, whereupon Brown appealed to the mayor's court. In the latter court evidence was given tending to show that the injury complained of was caused by the negligence of the foreman and workmen of the defendant. The jury found for the plaintiff, and the defendant brought error. The other facts appear from the opinion.

J. Pierson, for the plaintiff in error.

H. Z. Hayner, for the defendant in error.

By Court, BEARDSLEY, J. There is a striking confusion of law and fact in the charge given to the jury in this case, and it is not easy to extract the legal principle which was intended to be laid down for their guidance. It may be that the court intended to charge that Maxwell, although a participant in the carelessness by which he was injured, could nevertheless recover, because he was under the age of twenty-one years. But I do not understand the court to lay down this restricted rule; nor do I perceive that the infancy of Maxwell could affect the question of Brown's liability. As far as I can collect the view of the court,

they seem to have held, that a master, who employs several persons to labor for him in a particular business, giving to one of them a charge and superintendence of the concern, is responsible for an injury received by either of the others in the prosecution of the work, resulting from any careless act of himself and his fellow-workmen, provided such act was done under the general supervision and direction of the person so placed in charge by the master. In this, I think, the court clearly erred. The negligent act was as much the act of the plaintiff as of the defendant's foreman, and no man can, in any case, be allowed to recover a compensation for damages resulting from his own misconduct or negligence. A plaintiff suing for negligence, must himself be without fault: *Williams v. Holland*, 6 Car. & P. 23; *Pluckwell v. Wilson*, 5 Id. 875; *Rathbun v. Payne*, 19 Wend. 401; *Hartfield v. Boper*, 21 Id. 619 [34 Am. Dec. 273]. In the case last cited, this principle was applied against a child of about two years of age. The late Mr. Justice Cowen there remarked: "An infant, or lunatic, is liable personally for wrongs which he commits against the person and property of others: *Bullock v. Babcock*, 8 Wend. 391, 394. And when he complains of wrongs to himself, the defendant has a right to insist that he should not have been the heedless instrument of his own injury. He can not, more than any other, make a profit of his own wrong: *Volenti non fit injuria*."

It was recently adjudged in Massachusetts, that where two persons were employed by the same company to perform separate duties and services, tending to the same end, and one of them, while performing his own appropriate and peculiar duty, was injured by the negligent act of the other in respect to his branch of the service, the former had no remedy against the common employer: *Farwell v. The Worcester Railroad Company*, 4 Metc. 49 [38 Am. Dec. 339]. In that case the party injured was free from all fault, he being in no sense a party to the negligent act which produced the injury; and yet the court held the master was not liable to one servant, under such circumstances, for the careless act of the other. That case appears to have been thoroughly examined and considered, and I entertain no doubt of its correctness. But it is not necessary to place the present decision on that principle. Here, the plaintiff below voluntarily aided to do the act complained of, and he can not be allowed to make his own misconduct the foundation of a claim for redress. The judgment must be reversed.

Judgment reversed.

MASTER IS NOT LIABLE FOR NEGLIGENCE OF FELLOW-SERVANT, engaged in the same general employment, where he has used due diligence in the selection of such fellow-servant, and has furnished to his employees suitable means for carrying on the business in which they are engaged: *Farwell v. Worcester R. R. Corporation*, 38 Am. Dec. 339, note 346, and the cases there cited and referred to; *Ooon v. Utica & Syr. R. R. Co.*, 6 Barb. 237; *Brand v. Troy & Schenectady R. R. Co.*, 8 Id. 383; *Ooon v. Syracuse & U. R. R. Co.*, 5 N. Y. 494; *King v. Boston & W. R. R. Co.*, 9 Oush. 114; *Toledo, W. & W. R. R. Co. v. Durkin*, 76 Ill. 397, all citing the principal case.

THE PRINCIPAL CASE IS CITED in *Honeysberger v. Second Ave. R. R. Co.*, 2 Abb. N. Y. App. Cas. 381; S. C., 33 How. 199; S. C., 1 Keyes, 572; in *Kreig v. Wells*, 1 E. D. Smith, 77, in *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 359, and in *Chicago & Miss. R. R. Co. v. Patchin*, 16 Ill. 202, to the point that an infant who sues for personal injuries caused by a defendant's negligence, must be free from negligence on his own part; in *Oroster v. People*, 1 Park. 455, to the point that an infant is liable for his tort in an action for damages; and to the point that a plaintiff, in an action for damages, can not recover, where he is guilty of contributory negligence, in the following cases: *Clark v. Syracuse & U. R. R. Co.*, 11 Barb. 115; *Center v. Finney*, 17 Id. 99; *Dascomb v. Buffalo & St. L. R. R. Co.*, 27 Id. 223; *Cook v. Champlain Trans. Co.*, 1 Denio, 99; *Button v. Hudson River R. R. Co.*, 18 N. Y. 251; *Wright v. N. Y. Cent. R. R. Co.*, 25 Id. 564; *Needham v. San Francisco & S. J. R. R. Co.*, 37 Cal. 422.



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ACCESSION.

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ACCOUNT.

1. WHERE AN ACCOUNT HAS BEEN SETTLED, BALANCE STROKE, AND SURETY GIVEN FOR ITS PAYMENT, a party complaining of fraud or mistake must allege it specifically and prove the allegation, before a court will allow him to unravel the account. *Langdon v. Roane*, 60.
2. WHERE ACCOUNT IS MADE UP AND RENDERED, the party receiving it is bound to examine it. If he admits it to be correct, it becomes a stated account and binding on both parties; so, also, if he neither admits nor makes objection within a reasonable time, his silence will be construed into an acquiescence in its justness, and it becomes binding as a stated account. *Id.*

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ACKNOWLEDGMENTS.

1. CERTIFICATE OF ACKNOWLEDGMENT TO MORTGAGE SUFFICIENTLY IDENTIFIES the party executing the instrument, where it states that the "above-named mortgagor" personally appeared before the certifying officer and was "personally known" to him "as the identical person who executed said mortgage" and "acknowledged the same as his free act and deed for purposes therein expressed." *Livingston v. Kettelle*, 166.
2. OFFICIAL CHARACTER OF JUSTICE TAKING ACKNOWLEDGMENT is sufficiently shown by a certificate purporting to have been executed in a particular county, and stating that the officer is "an acting justice of the peace" without saying of what county. *Id.*
3. FAILURE IN AN ACKNOWLEDGMENT TO SHOW THE OFFICIAL CHARACTER of the person by whom it was taken, is not fatal, and may be remedied by evidence of such official character. *Byer v. Etnyre*, 410.

ACTIONS.

MONEY HAVING BEEN PAID THAT COULD NOT HAVE BEEN LEGALLY COLLECTED, yet if there was a natural obligation resting upon the party to pay, he can not maintain an action to recover it, upon the rule of equity that no man ought to better his condition at another's expense. *Worley v. Second Munic. of N. O.*, 333.

See **BANKS AND BANKING**, 4, 9; **BONDS**, 1; **DAMAGES**; **DETINUE**; **HUSBAND AND WIFE**, 2; **STATUTE OF FRAUDS**, 10; **WARRANTY**, 1.

ACTS OF GOD.

See **COMMON CARRIERS**, 1, 2.

ADVERSE POSSESSION.

1. **GRANTEES IN POSSESSION OF LAND UNDER CONVEYANCES FROM AN AGENT**, given in his own name, or in that of his principal, which possession has been uninterrupted for more than twenty years, will be protected in such possession, and notice and acquiescence on the part of the principal will be presumed. *Farrow v. Edmundson*, 250.

2. **ADVERSE HOLDING BY AN AGENT FOR TWENTY YEARS**, under a superior title, after notice to the principal, will bar the latter. *Id.*

3. **PRESUMPTION OF SUCH ADVERSE HOLDING WILL BE REBUTTED** if such superior title were purchased with the principal's money. *Id.*

See **DEDICATION**, 3; **LANDLORD AND TENANT**; **WATERCOURSES**, 4.

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AGENCY.

1. **PURCHASER FROM AN AGENT MAY OFFSET A DEBT DUE HIM** by the latter in a suit by the principal for the purchase money, where he has no knowledge of the agency at the time of the purchase. *Gardner v. Allen*, 45.

2. **DECLARATIONS OF AN AGENT ARE ADMISSIBLE AS AGAINST HIS PRINCIPAL**, only when made in regard to a transaction then pending, in which the agent is acting within the scope of his authority. *Stiles v. Western R. Co.*, 486.

3. **CREDIT GIVEN TO AN AGENT DOES NOT EXONERATE THE PRINCIPAL**, if at the time that the credit was given, the agency was unknown to him who gave it. *Henderson v. Mayhew*, 434.

4. **PRINCIPAL WILL NOT BE PREVENTED FROM OBTAINING THE POSSESSION OF lands held by his agent from the fact that such agent, after judgment of eviction had been rendered against him under a superior title, bought up such superior title, if there was no actual eviction.** *Farrow v. Edmundson*, 250.

5. **RATIFICATION OF A DEMAND MADE BY ONE PURPORTING to act for another** may be made by the latter by adopting the action founded upon such demand. *Town of Grafton v. Follansbee*, 736.

6. **SUIT SHOULD BE BROUGHT IN NAME OF PRINCIPAL**, and not in that of the agent, where on the face of the contract it purports to have been made

by or with an agent having no direct or beneficial interest in the transaction. *Bayley v. Onondaga Co. Mut. Ins. Co.*, 759.

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ALTERATION OF INSTRUMENTS.

1. ALTERATION CAN BE EFFECTED BY INSERTION OF DATE where it has been omitted, as well as by the changing of a date already affixed. *English v. Brencman*, 96.
2. WHERE DATE OF INSTRUMENT IS IMMATERIAL, its insertion after delivery, by the holder, does not vitiate it. *Id.*
3. WHERE A NOTE IS COMPLETE WHEN DELIVERED to the holder, he can not alter it without an authority in fact from the drawer. *Id.*
4. HOLDER FILLING IN BLANK FOR DATE in a note, after its delivery to him, by which the time of payment is accelerated, without the consent of the maker, renders the note void. *Id.*
5. BURDEN OF PROOF IS ON PARTY ALTERING NOTE to show that it was done by authority of the maker. *Id.*
6. ALTERATION IN MATERIAL PART OF AN INSTRUMENT avoids it. *Id.*

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OWNER OF A DANGEROUS ANIMAL IS LIABLE for any damage caused by the same, after notice of one instance of similar misbehavior on the part of such animal. *Kittredge v. Elliott*, 717.

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SECRET AGREEMENT OF A DEBTOR, MADE AT THE TIME OF AN ASSIGNMENT for the benefit of his creditors, by which he promises to pay a certain creditor his demand in full, as an inducement to his joining in the assignment and in releasing the common debtor, is void, as being a coercion upon the debtor and a fraud upon the other creditors. *Barnsdell v. Edgerton*, 508.

See **ATTACHMENTS**, 5; **NEGOTIABLE INSTRUMENTS**, 19.

ASSUMPSIT.

1. **GENERAL INDEBITEDNESS COUNT IN DECLARATION IN ASSUMPSIT** will sustain a recovery for items of indebtedness omitted by mistake on a settlement of accounts between the parties to such action. *Sage v. Hawley*, 128.
 2. **UNDER THE PLEA OF NON ASSUMPSIT, EVIDENCE OF FRAUD, or total failure, or want of consideration, may be given, because it reaches to the cause of action and the validity of the contract.** *Breser v. Harris*, 587.
- See **COMMON CARRIERS**, 14; **CORPORATIONS**, 19; **EXECUTIONS**, 7; **PLEADING AND PRACTICE**, 2.

ATTACHMENTS.

1. **GARNISHEE MAY PLEAD IN ABATEMENT A PENDING ATTACHMENT** of the debt upon which he is sued. *Crawford v. Clute*, 92.
2. **PENDENCY OF AN ATTACHMENT DOES NOT BAR THE PROSECUTION** of a suit by the original creditor against the garnishee, but merely suspends his right of action until the attachment is determined. *Id.*
3. **GARNISHEE, PLEADING IN ABATEMENT A GARNISHMENT PENDING FOR SAME DEBT, must set forth in his plea the proceedings at large, that it may be seen that the right to attach the debt existed, and that the law has been strictly pursued.** *Id.*
4. **PLEA IN ABATEMENT OF A GARNISHMENT PENDING FOR THE SAME DEBT IS BAD, that does not aver that the court from which it is issued has jurisdiction, or that fails to allege that the affidavit required by law upon suing out garnishment process was made, or to aver that the entire debt was attached, & not, a portion thereof, stating it.** *Id.*
5. **SURETY ON ATTACHMENT BONDS IS DISCHARGED BY INSOLVENCY** of the defendant and an assignment over of his property for the benefit of his creditors. *Keyes v. Shannon*, 299.
6. **JUDGMENT AGAINST SYNDIC DOES NOT BIND SURETY** on attachment bond, as such a judgment only compels the syndic to place the claim on his tableau of distribution; and is different from a personal judgment of defendant, for the satisfaction of which the surety is bound. *Id.*
7. **LIABILITY OF SURETY ON ATTACHMENT BOND** contemplates a personal judgment against the defendants in the suit; one that could have been satisfied out of the property attached, which the bond was intended to represent; and not a judgment against the defendants' syndic, as such judgment could not be so satisfied. *Id.*
8. **JUDGMENT AGAINST SYNDIC CAN NOT BE SATISFIED FROM PROPERTY ATTACHED** in a suit brought before the failure, as such property must be considered as a part of the general fund, from which all the creditors are to be paid. *Id.*

9. ATTACHMENT GIVES NO LIEN IN CASE OF THE DEFENDANT'S FAILURE. *Id.*
10. MONEY MAY BE ATTACHED IN THE HANDS OF AN OFFICER, where it is the residue of the proceeds of goods sold under execution, and remaining due defendant after fully satisfying the writ. *King v. Moore*, 44.
11. JUSTICE OF THE PEACE IS LIABLE TO GARNISHMENT PROCESS for money collected by him, and service of such process upon him affords a sufficient excuse for not paying over such money to the person for whom collected. *Clark v. Boggs*, 85.
12. WHERE PARTY PROCEEDING BY ATTACHMENT ATTACKS A SALE on the ground that it was fraudulent and void as against creditors, he must show that the justice had jurisdiction and that the process was regularly issued. And this is necessary to the justification of the officer as well as the creditor. *Van Etten v. Hurst*, 748.
13. ATTACHMENT AGAINST NON-RESIDENT DEBTOR, under the act to abolish imprisonment for debt, may issue without any affidavit; and an affidavit made in such proceeding is extrajudicial. But the plea must, in such a case, show that the debtor was a non-resident, and that the plaintiff in the attachment was his creditor; and an averment that the justice issued the attachment on an affidavit of these facts will not avail. *Id.*
14. FACTS ON WHICH JURISDICTION DEPENDS MUST BE SET FORTH in a plea of justification under an attachment, where it is necessary to show jurisdiction. General averments that the party complied with the statute, and that the proceedings were according to its requirements, will not answer. *Id.*
15. RETENTION OF THE POSSESSION OF PROPERTY LEVIED UPON is essential to the continuance of an attachment lien, unless the property is receipted for. *Chadbourn v. Sumner*, 720.
16. PROPERTY ATTACHED MUST BE REMOVED, when such removal is necessary for the retention of possession, notwithstanding such removal will be attended with some inconvenience. *Id.*
17. KNOWLEDGE THAT AN ATTACHMENT HAS BEEN LEVIED, will not prevent a subsequent attachment on the same property, if no possession be retained under the former. *Id.*
18. SHERIFF'S RETURN TO A WRIT OF ATTACHMENT, as between the parties to the suit and their privies, is conclusive; but as to third persons it is simply *prima facie*. Such return may be given in evidence, although it appears that no judgment has been rendered in the action in which the attachment was issued. *Id.*

See BONA FIDE PURCHASERS; SHERIFFS.

ATTORNEY AND CLIENT.

1. CONDITIONAL OBLIGATION TO PAY AN ATTORNEY AN EXTRA FEE IN CASE OF SUCCESS in an action in which the obligor is not a party, is given upon a valid and sufficient consideration, if such obligor is a party to other suits in which the same question is involved. *Clay v. Ballard*, 328.
2. CLIENT ENGAGING A LAW FIRM UPON A CONDITIONAL FEE can not set up as a defense, to an action by them, that one of them never took part in the trial of the case. Business intrusted to two professional men, associated as partners, may be attended to by either. *Simon v. Brunshear*, 321.

See PLEADING AND PRACTICE, 13, 14, 19.

AUTREFOIS ACQUIT.

See CRIMINAL LAW, 13, 14.

BAGGAGE.

See COMMON CARRIERS, 16-18.

BAILMENTS.

SPECIFIC PLEDGE OR APPROPRIATION OF GOODS, WITH INTENT THAT THEY SHALL BE A SECURITY OR PAYMENT, vests the property in them, as soon as deposited with a bailee, in the person to whom they are to be delivered. *Desha v. Pope*, 76.

BANKRUPTCY AND INSOLVENCY.

1. **STATUTE OF LIMITATIONS DOES NOT PREVENT PROOF OF CLAIM AGAINST INSOLVENT'S ESTATE** under the insolvent laws where the claim was not barred when the notice of proceedings in insolvency was first published, though the statutory period has run before the claim is proved. *Mines v. Thacher*, 444.
 2. **DISCHARGE UNDER UNITED STATES BANKRUPT ACT OF 1841 LEAVES INDEPENDENT SECURITIES** or other means of payment, held by a creditor of the bankrupt, unimpaired, though it releases the debtor from all further personal liability. *Id.*
 3. **PROCEEDINGS UNDER STATE INSOLVENT LAW INSTITUTED BEFORE ENACTMENT OF BANKRUPT LAW OF 1841** are not superseded by an application of the insolvent for a discharge under the bankrupt act, and such discharge does not affect the right of creditors, existing at the date of his assignment under the insolvent law, to prove their claims against his estate in the insolvency proceedings. *Id.*
 4. **CLAIMS AGAINST INSOLVENT'S ESTATE MAY BE PROVED AT FIFTH MEETING** of creditors under the Massachusetts insolvent law of 1838, but only so as to affect funds remaining unappropriated in the assignee's hands. *Id.*
- See ATTACHMENTS, 5-9; BANKS AND BANKING, 1, 4; FRAUDULENT CONVEYANCES, 4, 5; MORTGAGES, 4.

BANKS AND BANKING.

1. **ALLOWANCE OF A CLAIM AGAINST AN INSOLVENT BANK** by the receivers, is satisfactory proof thereof, without resort to the books of the bank. *Watson v. Phoenix B'k*, 500.
2. **WHETHER LEDGER OF THE BANK, PRODUCED BY THE BANK'S PRESIDENT,** is *prima facie* evidence of the credits contained therein, *quære*. *Id.*
3. **DEMAND BY A DEPOSITOR, PRIOR TO BRINGING SUIT FOR HIS DEPOSIT,** is unnecessary, where the bank has suspended payment, closed its doors, and refuses to admit its creditors. *Id.*
4. **DEPOSITOR IS NOT DEPRIVED OF HIS RIGHT OF ACTION,** against an insolvent bank, for the amount of his deposit, from the fact that he has presented his claim to the bank receivers, they not having required of him to give up the evidence of his demand, nor agreed to pay him a dividend. *Id.*
5. **DEPOSITOR IS ENTITLED TO INTEREST ON THE BALANCE DUE HIM BY A BANK,** from the commencement of his action, notwithstanding the bank

is restrained from carrying on its business, and a receiver has taken charge of its property. *Id.*

6. SAVINGS INSTITUTION CAN NOT PROHIBIT THE WITHDRAWAL OF DEPOSITS under a power in its charter to regulate such right by limiting its exercise to such reasonable time as the institution may appoint. *Mabin v. Savings Institution*, 349.
7. INSUFFICIENCY OF THE ASSETS OF A SAVINGS INSTITUTION TO PAY ALL OF ITS DEPOSITORS can not excuse its refusal to pay any depositor who seeks to withdraw his deposit, after proper notice required by the by-laws of the institution. The relation of partners does not exist between the different depositors. *Id.*
8. RIGHT OF A SAVINGS INSTITUTION TO DIVIDE ITS PROPERTY among its depositors does not authorize it to refuse to pay a deposit because of the insufficiency of its assets to pay all deposits. The power can only be exercised after it has been decided by vote of the trustees to make such division of the property. *Id.*
9. BANK CAN NOT MAINTAIN SUIT ON NOTE GIVEN TO IT without consideration, for the purpose of making a colorable and false statement of the condition of its assets. *Agricultural Bank v. Robinson*, 385.
10. MERE SUSPENSION OF SPECIE PAYMENT BY A BANK can not create a forfeiture where the charter provides that, in such a case, the person having the right to demand payment shall be entitled to recover damages. *State v. R. H. Bank*, 109.
11. RECOGNITION OF BANK AS AN EXISTING CORPORATION, AFTER CAUSE OF FORFEITURE, by the state, estops the state from setting this up as a ground of forfeiture. *Id.*
12. IN ACTION ON BANK NOTES DESTROYED BY FIRE it is necessary to furnish very strong and conclusive evidence of the destruction. *Wade v. N. O. C. & B. Co.*, 296.
13. WANT OF IDENTITY OF NOTES BY NUMBERS AND DATES is not a fatal defect in the evidence, when it is supplied by such strong concurrent circumstances as to leave no reasonable doubt of the fact alleged. *Id.*
14. DESTRUCTION OF BANK NOTES BY FIRE DOES NOT DESTROY OBLIGATION of the bank to pay; every note it has put in circulation is, in contemplation of law, still due by the bank. *Id.*

See CORPORATIONS, 8, 19; CRIMINAL LAW, 19, 20.

BARRATRY.

See INSURANCE—MARINE, 1.

BILLS OF EXCEPTION.

See PLEADING AND PRACTICE, 10-12.

BILLS OF EXCHANGE.

See NEGOTIABLE INSTRUMENTS.

BLANKS.

See ALTERATION OF INSTRUMENTS; NEGOTIABLE INSTRUMENTS, 12.

BONA FIDE PURCHASERS.

ATTACHING CREDITOR WHO HAS NOT PARTED WITH HIS PROPERTY on the credit of goods fraudulently obtained by the debtor from a third person, is not to be regarded as a *bona fide* purchaser of such goods. *Thompson v. Rose*, 121.

See EXECUTIONS, 32; EXECUTORS AND ADMINISTRATORS, 8; LEASES, 10.

BONDS.

1. BOND PAYABLE TO DIRECTORS OF COMPANY, THEIR SUCCESSORS OR ASSIGNS, is in legal effect made to the company, which may maintain an action thereon in its corporate name. *Bayley v. Onondaga Co. Mut. Ins. Co.*, 759.

2. DECLARATION ON BOND MADE TO DIRECTORS OF COMPANY ought to allege that it was made to them by the name and description of the directors of the company; but after verdict or judgment by default, the declaration will be sufficient without such an averment. *Id.*

See ATTACHMENTS, 5-7; EXECUTIONS, 14; EXECUTORS AND ADMINISTRATORS, 6; INDEMNITY; JUDGMENTS, 8, 9; PLEADING AND PRACTICE, 19.

BOOK ENTRIES.

See BANKS AND BANKING, 2; EVIDENCE, 6, 7.

BURDEN OF PROOF.

See ALTERATION OF INSTRUMENTS, 5.

BY-LAWS.

See COMMON CARRIERS, 9-11.

CASE.

See COMMON CARRIERS, 14.

CHALLENGE.

See JURY AND JURORS.

CHARTER.

See CORPORATIONS; QUO WARRANTO.

CIRCUIT COURT.

See EQUITY, 6, 8; JURISDICTION; MORTGAGES, 7.

COLLISIONS.

See COMMON CARRIERS, 8.

COMMISSIONERS.

See HUSBAND AND WIFE, 4.

COMMON CARRIERS.

1. COMMON CARRIERS ARE NOT LIABLE FOR LOSS OCCURRING by the act of God or by the public enemies of the country. *Neal v. Sanderson*, 609.

2. "INEVITABLE ACCIDENT" IS A TECHNICAL EXPRESSION, and is synonymous with "the act of God." *Id.*
3. COMMON CARRIER DOES NOT ASSUME ALL RISKS, where the bill of lading does not contain the clause "excepting the dangers of the river," so as to preclude him from showing that the loss occurred by "inevitable accident." *Id.*
4. LAW CONCERNING COMMON CARRIERS ENGRAFTS UPON THEIR CONTRACT A CONDITION that the carrier shall not be responsible for inevitable accidents, and nothing but an express undertaking will dispense with this condition. *Id.*
5. COMMON CARRIERS ARE RESPONSIBLE FOR LOSS or damage of things intrusted to their care, unless the same is occasioned by accidental and uncontrollable events. *Van Horn v. Taylor*, 279.
6. "DANGERS OF THE RIVER" INCLUDE LOSS BY COLLISION, when there was no fault or carelessness on the part of the carrier, and it was out of his power to have prevented it. *Id.*
7. COMMON CARRIER OF GOODS IS ENTITLED TO PRO RATA FREIGHT, where the owner of them is willing to receive them at a place short of that to which the carrier stipulated to carry them. *Hunt v. Haskell*, 387.
8. CARRIER OF GOODS CAN NOT OF HIS OWN MERE MOTION lawfully sell them for the payment of his charges. But if he sells them, and the owner regains possession through a friend who buys them in, the owner, in an action of trover therefor, can recover only whatever damages he sustained in regaining the possession. *Id.*
9. RAILROAD COMPANY MAY MAKE REASONABLE REGULATIONS respecting passengers and other persons using its road or houses and buildings connected therewith, the reasonableness of such regulations depending in some measure upon the locality of the depot at which they are adopted. *Commonwealth v. Power*, 465.
10. REGULATIONS OF RAILROAD COMPANY NEED NOT BE IN FORM OF BY-LAWS, enforced by penalties and forfeitures. *Id.*
11. RAILROAD COMPANY MAY DELEGATE TO SUPERINTENDENT of a particular depot the power to make regulations for the government of persons resorting there. *Id.*
12. LICENSE TO PUBLIC TO ENTER RAILROAD DEPOT, except for the purpose of taking passage, is revocable. *Id.*
13. SUPERINTENDENT OF RAILROAD DEPOT MAY PROHIBIT INNKEEPERS from coming upon the platform at such depot to solicit custom; and where the rule has been persistently violated by a particular person, he may be forcibly excluded from the platform, although he has a ticket and comes there to take passage on the train, if he does not show his ticket or declare his purpose, and the superintendent has ground to believe and does believe that he comes to solicit custom, and uses no more violence than necessary to expel him from the platform; and such expulsion is not indictable as an assault. *Id.*
14. COMMON CARRIER IS LIABLE IN TROVER FOR GOODS LOST BY HIS ACT, though without any intentional wrong on his part; but trover will not lie for the mere omission of the carrier. The remedy in such a case is *assumpsit*, or a special action on the case. *Hawkins v. Hoffman*, 767.
15. DEMAND AND REFUSAL ARE ONLY EVIDENCE OF CONVERSION where the defendant was in a condition to deliver the property if he would. *Id.*

16. AGREEMENT TO CARRY PASSENGER'S ORDINARY BAGGAGE IS IMPLIED in the contract to carry the passenger himself, but the implication can not be extended a single step beyond such things as the traveller usually has with him as a part of his luggage. *Id.*
17. TERM BAGGAGE DOES NOT INCLUDE SAMPLES OF GOODS carried in a trunk for the purpose of carrying on traffic as a merchant. *Id.*
18. WHETHER MONEY TO MEET TRAVELING EXPENSES, carried in a passenger's trunk, is included in the term baggage, query. *Id.*
See TROVER, 3.

COMMUNITY PROPERTY.

See HUSBAND AND WIFE, 5; MARRIED WOMEN, 1, 2.

COMPOSITION.

1. PROMISSORY NOTE GIVEN BY A DEBTOR FOR THE PURPOSE of inducing a creditor to consent to a composition, is voidable in law or equity. Page v. *Carter*, 726.
2. COMPOSITION IS NOT AVOIDED BY REASON OF ANY UNFAIR PREFERENCE obtained by one creditor through a secret agreement with the debtor. *Id.*

CONDITIONS.

See CONTRACTS, 4, 9; DEEDS, 7; WILLS, 1.

CONFLICT OF LAWS.

See NEGOTIABLE INSTRUMENTS, 11; STATUTE OF LIMITATIONS, 3.

CONSIDERATION.

See ASSUMPTION, 2; ATTORNEY AND CLIENT, 1; CONTRACTS, 6, 7, 8; DEEDS; MORTGAGE, 1; NEGOTIABLE INSTRUMENTS, 15, 32; PUBLIC LANDS; STATUTE OF FRAUDS, 2; SURETYSHIP, 8.

CONSPIRACY.

See CRIMINAL LAW, 16, 18.

CONSTITUTIONAL LAW.

1. STATUTE ANNULLING A FRANCHISE IS VOID AS WITHIN THAT PROVISION OF THE FEDERAL CONSTITUTION declaring that "no state shall pass any law impairing the obligation of contracts" where no right of revocation was retained in the franchise. *Michigan State Bank v. Hastings*, 549.
2. STATE MAY SUE, BUT CAN NOT BE SUED IN ITS OWN COURTS UNLESS IT CONSENTS to submit itself to their jurisdiction. Remedy of a party upon a contract with the state is by an appeal to the legislature, who it is fair to presume will make provision for its full execution and do ample justice to the party with whom it may have contracted. *Id.*
3. WHERE A STATE, BY AN EXPRESS ACT, RATIFIES AN AGREEMENT MADE BY ITS OFFICERS, except a condition subsequent, contained therein, and takes possession of the property under such agreement, it is a ratification of the whole agreement, the exception being null and void, and is not a breach of that condition. *Id.*

4. STATUTE SHOULD NOT BE DECLARED UNCONSTITUTIONAL but in cases of plain and manifest violation of that instrument by the legislature. *Williamson v. Williamson*, 636.
 5. ORDINANCE IMPOSING A WHARFAGE CHARGE UPON ALL PACKAGES LANDED OR SHIPPED within the city limits is not in conflict with that clause of the federal constitution giving congress the power to regulate commerce with the several states and foreign nations, and declaring that no state shall tax or lay a duty on exports or imports. *Worsley v. Second Municipality of New Orleans*, 333.
 6. CITIZENS OF SISTER STATES ARE NOT EXEMPTED from the operation of our laws, when they come here. *Harrison v. Mayor of Vicksburg*, 633.
- See ESTATES OF DECEASED PERSONS; EXECUTORS AND ADMINISTRATORS, 10;
INSANITY, 4; TAXATION, 3;

CONTRACTS.

1. WHERE ONE AGREES TO LEND HIS CREDIT TO ANOTHER to enable the latter to manufacture goods, stipulating that he shall have the right to take, at his pleasure, the articles so manufactured and sell them and apply the proceeds to the extinction of the debt, such contract will be held valid as between the parties themselves, and also as to the creditors of the manufacturer, where possession is taken under the contract before the creditors attach. *Calkins v. Lockwood*, 143.
2. THE LAW CONCLUSIVELY PRESUMES PARTIES TO A CONTRACT TO UNDERSTAND ITS OBLIGATIONS, and evidence is not admissible to show their understanding to have been otherwise. *Gist v. Drakely*, 426.
3. CONTRACT WITH PROPRIETOR OF LAND TO CUT TIMBER THEREFROM and deliver it at a certain place, at an agreed price to be paid after the work is completed, is rather in the nature of a mortgage than of a lien, and the claim of the contractor upon the timber will not be lost by his allowing it to go into the possession of the proprietor of the land, subject to his right to resume it in case payment is not made according to the contract. And where the contractor permits such possession to be taken, with an expectation raised by the proprietor, that the avails of the sale of it will be applied to the payment of his claim, if the proprietor disappoints this expectation he will not be permitted to say that the contractor's right to reclaim the possession has been relinquished by him. *Oakes v. Moore*, 379.
4. PARTIES AGREEING TO HAVE TIMBER ESTIMATED BY CERTAIN SURVEYOR are bound by his estimate, where it does not appear that he acted corruptly or made any gross mistake. *Id.*
5. CONTRACT WILL NOT BE PRESUMED TO HAVE IMPOSED AN ABSURD OR IMPOSSIBLE CONDITION on one of the parties, but will be interpreted as the parties must be supposed to have understood the condition at the time. *Clay v. Ballard*, 328.
6. PROMISE TO PAY DEBT WHICH HAS BEEN VOLUNTARILY RELEASED is without legal consideration, and is, therefore, not binding upon the promisor. *Warren v. Whitney*, 406.
7. MORAL OBLIGATION TO PAY DEBT DOES NOT CONSTITUTE LEGAL CONSIDERATION for a promise to pay it, in a case where the debt has been voluntarily discharged. *Id.*

8. **FORBEARANCE TO PROSECUTE CLAIM WHICH HAS NO LEGAL FOUNDATION** is not a good consideration for a promise. *N. H. Savings Bank v. Colcord*, 685.
9. **OBLIGOR IS EXCUSED FROM THE PERFORMANCE OF A DISJUNCTIVE CONDITION**, if one of the alternative things becomes impossible by the act of God, or by the act or default of the obligee. *Smith v. Durell*, 732.
- See **CONSTITUTIONAL LAW**, 1; **EVIDENCE**, 2, 3; **FRANCHISES**, 2; **PLEADING AND PRACTICE**, 23; **RESCISSIÖN OF CONTRACTS**.

CONTRIBUTION.

See **CO-TENANCY**, 1.

CONVERSION.

See **COMMON CARRIERS**, 15; **TROVER**, 2.

CORPORATIONS.

1. **STOCKHOLDERS OF CORPORATION CAN NOT, WITHOUT ITS CONSENT**, legally obtained, bring suit in equity to compel its officers and agents to account and make settlements with them, for moneys of the corporation received by such officers and agents. *Hersey v. Veazie*, 364.
2. **WHERE AGENTS OF CORPORATION HAVE ACTED FRAUDULENTLY TOWARDS IT**, the wrong is primarily committed against the corporation, and until it is shown that the corporation is incapable of granting redress to its stockholders, or that it improperly and collusively refuses to do so, they can not bring suit to redress the wrong. *Id.*
3. **WHERE DEBTOR TRANSFERS SHARES IN CORPORATION TO HIS CREDITOR**, the latter agreeing "to account for the said shares, or reconvey them," the former has no such interest therein as will enable him to maintain a suit in equity to compel the corporation to account to him for the profits or property. *Id.*
4. **CORPORATE CHARTER MAY BE FORFEITED** if the trust upon which it is granted be broken and the corporation perverted. *State v. Real Estate Bank*, 109.
5. **GROUND OF FORFEITURE OF CORPORATE CHARTER** once vested by a full performance of all preliminary conditions, are, first, a total neglect or non-user of its duties; secondly, an abuse of them, improvidently, ignorantly, or fraudulently. *Id.*
6. **COURTS LEAN AGAINST FORFEITURE OF CORPORATIONS**; their object is to preserve and uphold the estate, unless it be clear that the rights vesting in it have been improvidently neglected or illegally abused. *Id.*
7. **FORFEITURE BY CORPORATION IS WAIVED BY SUBSEQUENT LEGISLATIVE ACTS** recognizing the legal existence of the corporation. *Id.*
8. **IDEM—STATE BORROWING MONEY FROM A BANK**, after the suspension of specie payments, in virtue of an act of the legislature, is estopped from insisting upon the fact of suspension as a cause of forfeiture. *Id.*
9. **STATE CAN DISSOLVE CORPORATION BY JUDICIAL TRIAL AND JUDGMENT ONLY**; and this is so though the act provides that in default of fulfilling the condition, the corporation should be dissolved; in all cases the forfeiture must be judicially ascertained and declared. *Id.*

10. **MERE NON-USER BY CORPORATION IS NOT A SURRENDER**, and the court can not presume a surrender from non-user, or a failure to exercise its privileges, unless the charter contains some express provision to justify such inference. *Id.*
11. **CHARTER OF CORPORATION IS FORFEITED BY ASSIGNMENT** of all its property to trustees. *Id.*
12. **DOCTRINE OF WAIVER OF FORFEITURE OF CHARTER** of a corporation by subsequent legislative acts does not apply where by the terms of the charter the franchise absolutely determines upon failure to perform certain conditions. *State v. Fourth New Hampshire Turnpike*, 690.
13. **FORFEITURE OF CHARTER OF CORPORATION MUST BE ESTABLISHED BY JUDGMENT**, and can not be inquired into collaterally, where the charter provides that certain accounts shall be rendered to the legislature "under forfeiture of the privileges of the act in future." *Id.*
14. **STATE ALONE CAN ENFORCE FORFEITURE OF CHARTER FOR NEGLECT TO MAKE RETURNS** of the expenditures and profits of the corporation as provided in such charter. *Id.*
15. **LEGISLATURE MAY WAIVE FORFEITURE OF THE CHARTER** of a corporation for breaches of the conditions upon which it was created, by subsequent acts recognizing its continued existence. *Id.*
16. **ACCOMPLISH BY LEGISLATURE OF SUBSEQUENT ACCOUNTS OF CORPORATION WAIVES FORFEITURE** of its charter for failure to render prior accounts. *Id.*
17. **ACT AUTHORIZING TURNPIKE CORPORATION TO ALTER ROUTE OF ROAD WAIVES FORFEITURE** of its charter for a prior neglect to render accounts as required by such charter. *Id.*
18. **CLAUSE IN A CHARTER OF A CORPORATION PROVIDING "THAT THE LANDS, TENEMENTS, AND HEREDITAMENTS, which it shall be lawful for the said corporation to hold, shall be only such as shall be required for its accommodation in relation to the convenient transacting of its business, or such as shall have been bona fide mortgaged to it by way of security, or conveyed to it in satisfaction of debts, previously contracted in the course of its dealings, or purchased at sales upon judgments, which shall have been obtained for such debts," prohibits it from buying or selling or becoming a speculator in lands.** *Bank of Michigan v. Niles*, 575.
19. **CORPORATION PROHIBITED BY ITS CHARTER FROM DEALING IN REAL ESTATE**, entering into contracts for the purchase and sale of such property contrary to its charter, can not come into a court of equity and compel their specific performance. Equity will leave the parties as it finds them. *Id.*
20. **ASSUMPSIT FOR WORK AND LABOR ON ACCOUNT OF ENGRAVING bank bills will lie against a corporation** although such corporation is prohibited by law from engaging in the business of banking. *Underwood v. Newport Lyceum*, 260.
21. **TRESPASS MAY BE COMMITTED BY A CORPORATION**, if by its managers or authorized agents it commands the trespass, or sanctions it when committed. *Id.*
22. **MUNICIPAL AUTHORITIES ARE NOT EMPOWERED TO ALLOW** any erection on the streets or banks of the Mississippi river, which will obstruct the free use of such places by the public. *Shepherd v. New Orleans*, 269.

23. PERMISSION GIVEN BY THE CITY COUNCIL TO ERECT BUILDINGS on its streets, or on the banks of the river, incommodious to the public, does not prevent a subsequent council from removing such obstructions. *Id.*
24. NO ONE HAS THE RIGHT TO THE PERMANENT OCCUPANCY of the banks of the Mississippi, in the city of New Orleans, but the city council may erect wharves thereon at such places as commerce may require. *Id.*
25. EXECUTION ISSUED UPON JUDGMENT AGAINST MUNICIPAL CORPORATION may be levied upon the private property of an individual member of such corporation. *Beardsley v. Smith*, 148.
- See BONDS; QUO WARRANTO; STATUTES; SURETYSHIP, 9; TAXATION

COSTS.

COMPLAINANT WILL BE TAXED WITH COSTS where he could have obtained the relief to which he is entitled without a resort to equity. *Langdon v. Reame*, 60.

See TENDER, 2.

CO-TENANCY.

1. TENANT IN COMMON CAN NOT COMPEL CO-TENANTS TO CONTRIBUTE TO IMPROVEMENTS made by him on the common land, either at law or in equity, where the improvements were not necessary as reparations of the property, nor for its preservation or joint enjoyment, as where such improvements consist of a dwelling-house erected for his own benefit. *Louville v. Menard*, 161.
2. TENANT IN COMMON HAVING ERECTED DWELLING-HOUSE on the common land is entitled, on partition, to have the portion of land on which it is erected assigned to him, if practicable, without regard to the increased value of such portion arising from the improvement; and where the land not being susceptible of division is sold in partition proceedings under the statute, the tenant in common who erected the improvement is entitled, before a division of the proceeds, to the actual increase of the price received at the sale, caused by such improvement, and may maintain a bill in equity therefor. *Id.*
3. TENANT IN COMMON OF RIGHT OF FISHERY MAY, WITHOUT RELINQUISHING POSSESSION thereof, by entry or otherwise, maintain an action against his co-tenant for depriving him of such right. *Duncan v. Sylvester*, 400.
4. CONVEYANCE BY METES AND BOUNDS OF PORTION OF COMMON ESTATE, by one tenant in common, is void, and not merely voidable at the election of the co-tenant. *Id.*
5. MINGLING WHEAT BELONGING TO TWO PERSONS IN COMMON BIN, with the knowledge and assent of both, makes them tenants in common, and if one of them disposes of the whole without the authority of the other, he is liable in trover. *Nowlen v. Colt*, 756.

See PARTITION.

COUNTERFEITING.

See CRIMINAL LAW, 8.

COVENANTS.

See DEEDS, 1, 3; HUSBAND, 1-3; PLEADING AND PRACTICE, 21; WARRANTS; WATERCOURSES, 6.

CRIMINAL LAW.

1. **TO CONSTITUTE CAPACITY TO COMMIT CRIME** the accused must possess intelligence enough to have a criminal intent, and if his mental powers are so deficient that he has no will, conscience, or controlling mental power, or if through the overwhelming violence of mental disease his intellectual power is for the time obliterated, he is not a responsible moral agent and is not criminally liable for his acts. *Commonwealth v. Rogers*, 458.
2. **PARTIAL INSANITY DOES NOT RELIEVE** a party from criminal liability for an act, if he has sufficient capacity to distinguish between right and wrong as to that act, a knowledge that it is wrong and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong, and receive punishment. *Id.*
3. **PARTIAL INSANITY CONSISTING OF MELANCHOLY, ACCOMPANIED BY DELUSION**, of such a nature that under its influence the party has a real and firm belief of some fact not true in itself, but which, if true, would excuse his act, relieves him from criminal liability therefor. *Id.*
4. **PARTY COMMITTING HOMICIDE UNDER UNCONTROLLABLE IMPULSE**, overbearing reason and memory for the time being, and resulting from a diseased state of mind, accompanied by delusion, the known tendency of which state of mind is to break out into acts of violence, is not criminally liable therefor. *Id.*
5. **PRESUMPTION IS THAT ACCUSED WAS OF SOUND MIND** at the time of committing an act for which he is indicted, and to entitle him to an acquittal on the ground of insanity, he must overcome that presumption by satisfactory proof arising out of evidence introduced either by himself or by the prosecution. *Id.*
6. **PREPONDERANCE OF EVIDENCE OF INSANITY OF ACCUSED** is sufficient to warrant an acquittal. *Id.*
7. **CRIMES WHICH EXISTED PRIOR TO THE CONSTITUTION**, and were offenses at common law, although they may be forbidden by the constitution of the United States, and authority to punish the commission of them is conferred upon the federal courts, may also be punished by the state courts, unless the grant of power by the constitution is exclusive, or is made exclusive by act of congress. *Commonwealth v. Fuller*, 509.
8. **STATE COURTS HAVE POWER TO PUNISH THE CRIME OF COUNTERFEITING** the gold and silver coins of the United States, or which are made current by the laws thereof, or for uttering the same or bringing them into the United States with intent to utter them. *Id.*
9. **MISPELLING OF WORD IN INDICTMENT** does not render it invalid when the word is not changed into one of different signification, or where the word misspelled is surplusage merely. *State v. Hornsby*, 305.
10. **INDICTMENT IS INSUFFICIENT, IF FACTS ALLEGED BY IT** may all be true, and yet constitute no offense, and a verdict upon such an indictment does nothing more than merely verify the facts charged. *State v. Godfrey*, 382.
11. **DEFECTIVE INDICTMENT IS NOT AIDED BY VERDICT**, and a judgment thereon may be arrested. *Id.*
12. **WHERE AN OFFENSE IS CREATED BY STATUTE**, and there is an exception in the enacting clause, an indictment for such offense must negative the exception; but if there be a proviso therein which furnishes matter of excuse for the defendant, the indictment need not negative it, but he must plead it. *Id.*

13. **LEGAL IMPORT OF TERM AUTREFOIS ACQUIT** is that it is a plea made by a defendant, indicted for a crime or misdemeanor, that he has been formerly tried and acquitted of the same offense. *State v. Hornsby*, 314.
14. **TO SUSTAIN A PLEA OF AUTREFOIS ACQUIT**, a legal acquittal, by judgment upon trial, by verdict of a petit jury, must be shown. *Id.*
15. **NEW TRIALS IN CAPITAL CASES.**—All judges who are empowered to hear and determine indictments for crime, are invested with a discretionary power to grant new trials in capital cases, as well as in those of misdemeanor, where upon a sufficient showing, touching the merits or irregularities in the proceedings, justice and humanity demand it. *Id.*
16. **IT IS A CONSPIRACY, AND PUNISHABLE BY LAW, FOR SEVERAL PERSONS** to persuade a maiden lady, her father and mother, that a forged license is genuine, and that one of their number is a justice of the peace, and thus gain the consent of such father, mother, and daughter to the marriage of the latter. *State v. Murphy*, 79.
17. **RAPE CAN ONLY BE COMMITTED BY FORCE**; if the woman consent in the belief that an illegal marriage is legal, upon the fraudulent assertion of the pretended husband, the latter will not be guilty of rape. *Id.*
18. **CONSPIRACY TO COMMIT A CRIME IS MERGED IN THE CRIME UPON ITS EXECUTION**, only when the crime is of a higher grade than the conspiracy. Where two crimes are of equal grade, there can be no legal, technical merger. *Id.*
19. **REDEEMED BANK-NOTES ARE SUBJECTS OF LARCENY** while in possession of the issuing bank under the Massachusetts statute. *Commonwealth v. Rand* 455.
20. **THEFT STEALING BANK-NOTES IN ONE COUNTY AND CARRYING THEM INTO ANOTHER** may be prosecuted in the latter county. *Id.*
21. **LARCENY IS FELONY AT COMMON LAW.** *Sneed v. State*, 102.
22. **NO INDICTMENT FOR FELONY SHALL BE TRIED**, unless the defendant be personally present during the trial. *Id.*
23. **VERDICT CAN NOT BE RENDERED IN PRISONER'S ABSENCE**; and such a verdict is void. This principle applies where the prisoner is out on bail, the law not regarding the cause of his absence, as whether he is away voluntarily or against his will. *Id.*
24. **LENGTH, DEPTH, AND BREADTH OF WOUNDS NEED NOT BE STATED** in an indictment for murder. *State v. McCoy*, 301.
25. **TERM "MORTAL" IS INDISPENSABLE IN DESCRIBING BRUISE OR WOUND** in an indictment for murder, and when so described an adequate cause of death has been assigned, which will be supported by evidence of any deadly wound or bruise. *Id.*
26. **MURDER, AT COMMON LAW, CONSISTS OF THE STROKE AND CONSEQUENT DEATH.** *Id.*
27. **VENUE IN INDICTMENT FOR MURDER** where the stroke and the death occurred in different counties, was by the statute of 2 and 3 Edw. VI. in the county where the death took place; and when the death occurred out of the county, the statute of 2 Geo. II. provided that it should be tried in the county where the stroke happened. *Id.*
28. **OUR ACT OF 1805, INTRODUCING COMMON LAW IN CRIMINAL MATTERS**, adopted the system as it existed at that time, modified, explained, and perfected by statutory enactments, so far as those enactments are not

- found to be inconsistent with the peculiar character and genius of our government and institutions. *Id.*
29. WHERE DEATH TOOK PLACE IN ANOTHER STATE, an indictment in the parish where the stroke was given is valid. *Id.*
 30. INDICTMENT FOR PERJURY MUST SHOW PARTICULARLY TO WHAT FALSEHOOD the defendant has sworn; it is too indefinite to say that the defendant made oath to a false schedule in bankruptcy, where that schedule relates to a great variety of facts. *U. S. v. Morgan*, 234.
 31. CONSTITUTIONAL PROVISION GIVING ACCUSED RIGHT OF "HAVING COMPULSORY PROCESS for obtaining witnesses in his favor" simply means to say that the accused shall not be debarred the right of issuing subpoenas for his witnesses as in civil cases. *State v. Hornsby*, 305.
 32. COMPULSORY PROCESS TO COMPEL THE ATTENDANCE OF WITNESSES can only be exercised when the witness resides or is found within the district. *Id.*
 33. A SPEEDY TRIAL IS ONE CONDUCTED ACCORDING TO FIXED RULES, regulations, and proceedings of law, free from vexatious, capricious, and oppressive delays, created by the ministers of justice. *Nixon v. The State*, 601.
 34. STATUTE GIVING PRISONER THE RIGHT TO AN EXAMINATION OF THE INDICTMENT, "at least two entire days before the trial," means two judicial days, and hence excludes the fraction of a day of its service. *Id.*
 35. WHERE TRIAL CAN NOT POSSIBLY BE COMMENCED TILL THE LATTER PART of the last day of the term, its postponement till the next term is no infringement of the prisoner's right to a speedy trial. *Id.*
 36. IF THE CLERK OF CIRCUIT COURT FAILS TO DRAW THE JURORS as required, the certificate of the clerk of the probate court, that the list of jurors by whom a bill of indictment was found, was drawn in open probate court in the manner prescribed by law, is evidence that the panel was properly drawn. *Id.*
 37. NOLLE PROSEQUI ENTERED ON INDICTMENT FOR MURDER then pending, does not acquit the accused, when another indictment is instantly instituted for manslaughter. *State v. Hornsby*, 314.
 38. IDEM—WHERE UNDER INDICTMENT FOR MURDER, ACCUSED IS CONVICTED OF MANSLAUGHTER, and on appeal a new trial is granted, the attorney general may enter a *nolle prosequi* on the indictment for murder, and institute another for manslaughter without acquitting the accused. *Id.*
 39. PARTY CONVICTED OF MANSLAUGHTER ON INDICTMENT FOR MURDER can not be again indicted for the same murder. *Id.*
 40. NOLLE PROSEQUI DOES NOT AMOUNT TO AN ACQUITTAL nor to a pardon, but is simply a discharge of a particular indictment upon which it is entered, and is no bar to a future indictment for the same offense. *Id.*
 41. ATTORNEY MAY ENTER NOLLE PROSEQUI AT PLEASURE, before the jury is impeached, and without the consent of the court or accused, and not run counter to the fifth article to the amendments of the constitution of the United States. *Id.*
 42. APPEAL FROM PRELIMINARY DECISION OR INTERLOCUTORY ORDER OF CRIMINAL COURT will be dismissed on motion, as the right of appeal only accrues after verdict and judgment and sentence. *Id.*

43. CONVICTION AND PUNISHMENT FOR COMMISSION OF ASSAULT do not bar a civil suit against the offender for the same act, nor prevent the recovery of exemplary damages against him in such suit. *Cook v. Ellis*, 757.
44. JURY IN A CRIMINAL CASE MUST ACCEPT THE LAW to be as charged by the court. *Lord v. State*, 729.
45. JURY IN A CRIMINAL CASE SHOULD RENDER THEIR VERDICT of guilty or not guilty orally in open court, and a record should be made thereof. An improper written verdict attempted to be made should be rejected by the court. *Id.*

See COMMON CARRIERS, 13; GAMING; JURY AND JURORS, 2, 3.

DAMAGES.

1. TO MAINTAIN ACTION FOR SPECIAL DAMAGES, IT MUST BE SHOWN that they proceeded wholly and exclusively from the injury complained of, and not from the wrongful act of a third party remotely induced thereby. *Orain v. Petrie*, 765.
2. IN ACTION FOR SELLING TO BUTCHER DISEASED SHEEP AS SOUND, evidence that a third party who had contracted with the plaintiff to purchase mutton from him refused to perform such contract in consequence of a report that the plaintiff had purchased diseased sheep from the defendant, is not admissible for the purpose of showing special damages; nor is evidence that other customers refused, for the same reason, to buy mutton from him, admissible for that purpose. *Id.*
- See ANIMALS; COMMON CARRIERS, 8; EXECUTIONS, 13; MALICIOUS PROSECUTION, 6; NEGOTIABLE INSTRUMENTS, 11; NEW TRIAL, 3; NUISANCES; SLANDER, 4; SURETYSHIP, 12; WATERCOURSES, 10, 12.

DAMS.

See WATERCOURSES.

DANGERS OF THE RIVER.

See COMMON CARRIERS, 3, 6.

DECLARATIONS.

See AGENCY, 2; EVIDENCE, 14.

DECREES.

See JUDGMENTS; PLEADING AND PRACTICE, 27.

DEDICATION.

1. NO PARTICULAR FORM OR CEREMONY IS NECESSARY IN DEDICATION of land; it may be without deed or writing; all that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. *Rector v. Hart*, 650.
2. PARTY ATTEMPTING TO OBTAIN ADVANTAGE IN CONSEQUENCE OF HAVING MADE DEDICATION will be required to give ample proof of that fact. *Id.*
3. PARTY CAN NOT CLAIM THAT HE HAS MADE DEDICATION of the land so as to prevent a sale of it on execution against him, when it was laid off as a town by persons holding adversely to the claimant, the latter having never recognized the plat so made. *Id.*

DEEDS.

1. FREEHOLD ESTATE IN FUTURO WILL PASS BY DEED of bargain and sale of a covenant to stand seised. *Bell v. Scammon*, 706.
2. PRECUNARY CONSIDERATION, HOWEVER SMALL, WILL SUPPORT DEED of bargain and sale. *Id.*
3. CONVEYANCE TO SON-IN-LAW IS GOOD AS COVENANT TO STAND SEISED, where the consideration expressed is "the love and good will I bear D. L. as my son-in-law," though the grantor's daughter, wife of the grantee, and the only child of such daughter are both dead at the date of the deed. *Id.*
4. WHERE PART OF THE CONSIDERATION OF A DEED IS GOOD there can be no apportionment, though part may fail. Thus if several parcels of public lands are sold, on some of which are improvements and on some not, the sale of the first is a sufficient consideration for the note given to represent the purchase price of all. *Wilson v. Webster*, 230.
5. "MORE OR LESS"—AN AGREEMENT TO BUY AT A SPECIFIED PRICE PER ACRE, if the agreement contain an estimate of quantity, as being "— acres, more or less," is an agreement to pay at the stipulated price, for the number of acres as estimated, though this be more than the tract actually contains. *Jones v. Plater*, 408.
6. *IDEM*—THE WORDS "MORE OR LESS" EXCLUDE THE IDEA that a seller intended to bind himself that the actual quantity should correspond to the estimate. *Id.*
7. CLAUSE "SHALL INDEMNIFY AND SAVE HARMLESS," IN A DEED, IS A CONDITION SUBSEQUENT, and the property reverts to the grantor upon the failure of the grantee to perform the condition. *Michigan State Bank v. Hastings*, 549.
8. DEED CONVEYING ONE HALF OF A TRACT OF LAND "containing fifty-two acres and eighty rods and no more, and including the salmon fishery contiguous to said land," conveys only an undivided half of the salmon fishery. *Duncan v. Sylvester*, 400.

See EXECUTORS AND ADMINISTRATORS, 4

DEFAULT.

See BONDS, 2.

DEFINITIONS.

See FRANCHISES, 1; NEW TRIAL, 1.

DELIVERY.

See SALES, 5.

DEMAND.

See AGENCY, 5; BANKS AND BANKING, 3; COMMON CARRIERS, 14; NEGOTIABLE INSTRUMENTS; SURETYSHIP, 11; TROVER, 1, 2, 3; VENDOR AND VENDEE.

DEMURRER.

See PLEADING AND PRACTICE, 4, 26; STATUTE OF LIMITATIONS, 2.

DEPOSITIONS.

See EVIDENCE, 9, 10, 15.

DEPOSITS.

See BANKS AND BANKING, 2-3.

DETINUE.

ACTION OF DETINUE SURVIVES TO THE PERSONAL REPRESENTATIVES IN Mississippi by express statute. *Worton v. Howard*, 607.

DEVIATION.

See INSURANCE—MARINE, 9-12.

DEVISES.

See TAXATION, 5; WILLS, 1-3, 9.

DISCLAIMER.

See LANDLORD AND TENANT, 2.

DOMICILE.

See MARRIED WOMEN, 2.

DURESS.

See EVIDENCE, 2.

EASEMENTS.

See WATERCOURSES, 5.

EJECTMENT.

See VENDOR AND VENUEE.

ELECTION.

See WILLS, 8-11.

EQUITY.

1. COURTS OF LAW HAVE CONCURRENT JURISDICTION WITH COURTS OF EQUITY upon questions of fraud. *Brewer v. Harris*, 587.
2. CASE WITHIN THE EQUITY OF A STATUTE, though not within its letter, may be declared in a court of equity to be within the statute. *Davis v. Harbness*, 184.
3. EQUITY WILL NOT RELIEVE, ON GROUND OF MISTAKE, PURCHASER OF LAND, where equal information touching the nature and condition thereof was possessed by both parties, and the vendor acted with entire good faith, although the land turns out to be much less valuable than the parties, both of whom relied upon information derived from the same person, believed it to be. *McCobb v. Richardson*, 374.
4. ACT OBTAINED BY FRAUD MAY BE ANNULLED by a decree of the chancery court; but to authorize it, the case must be clearly made out. *Williamson v. Williamson*, 636.
5. EQUITY WILL GRANT RELIEF BY AVOIDING A SALE AND ALLOWING A MORTGAGEE TO PROCEED under the mortgage, where he has obtained judgment

and levied upon and purchased in the mortgaged property, under the false impression that the levy of the execution would draw to it the lien of the mortgage, and be superior to all liens attaching since the execution of the mortgage, especially upon his stipulating that the property shall sell for as much as it did under the execution sale at which he purchased. *Stover v. Herrington*, 86.

6. CHANCERY COURT HAS NO POWER TO REVISE and correct the decisions of the circuit court on its chancery side, under the constitution. *Tooley v. Gridley*, 628.
 7. EQUITY HAS NO JURISDICTION TO SET ASIDE PROCEEDINGS in another court, which have transpired in a matter falling under its legitimate cognizance. *Id.*
 8. IRREGULARITY IN CARRYING DECREE OF CIRCUIT COURT INTO EFFECT confers no authority on a court of chancery to interfere, as it is competent for the circuit court to pass upon and correct that matter. *Id.*
 9. EQUITY HAS NO POWER TO CORRECT ERRORS IN JUDGMENT of a court of law; that belongs to the appellate tribunal. *Yarborough v. Thompson*, 628.
 10. EQUITY CAN NOT COMPEL PARTY TO RELINQUISH JUDGMENT AT LAW, because his adversary did not comprehend his rights, or was mistaken in a matter of law. *Id.*
 11. DEFENDANT IN EQUITY CLAIMING AFFIRMATIVE RELIEF must seek it by way of a cross-bill, but he may, in his answer, rely on any matter which shows the complainant not entitled to the relief claimed in his bill. *Tarleton v. Vietes*, 193.
 12. EXCEPTION TO RULE, PROHIBITING A COURT OF CHANCERY FROM MAKING A DECREE, until all those who are substantially interested be made parties to the suit, exists where it is not in the power of the complainant to make them parties. *Michigan State Bank v. Hastings*, 549.
- See ACTIONS; CORPORATIONS, 1, 19; COSTS; EXECUTIONS, 30, 32; EXECUTORS AND ADMINISTRATORS, 3; GUARDIAN AND WARD, 2; INDEMNITY, 3; INFANCY, 1, 2; INJUNCTIONS; LIENS, 9; NEGOTIABLE INSTRUMENTS, 6; NOTICE, 2; POWERS, 1; STATUTE OF FRAUDS, 7, 8; WILLS, 14.

ESTATES OF DECEASED PERSONS.

1. ACT REQUIRING CLAIMANT AGAINST DECEASED PERSON'S ESTATE TO MAKE OATH in open court that the claim is justly due, is unconstitutional. *Riggs v. Martin*, 103.
2. IDEM.—The act of the legislature forbidding the affidavit of a claim to be received as evidence of the demand, and requiring that it be proved by other competent testimony, is unconstitutional. *Id.*

See MARRIED WOMEN, 2.

ESTOPPEL.

See BANKS AND BANKING, 11; LANDLORD AND TENANT, 1; MORTGAGES, 3.

EVICTIION.

See AGENCY, 4; WARRANTY, 1, 2.

EVIDENCE.

1. COURT MAY TAKE JUDICIAL NOTICE OF WHO ARE JUSTICES OF THE PEACE of the county in which it is sitting. *Livingston v. Keulle*, 166.
2. PAROL EVIDENCE IS INADMISSIBLE TO CONTRADICT THE TERMS OF A WRITTEN INSTRUMENT, in behalf of one of the parties thereto, in a controversy between himself and a stranger to the instrument. Thus, if charged with the ownership of a vessel, he can not show that the absolute bill of sale executed to him was intended as a mortgage. *Henderson v. Mayhew*, 434.
3. PAROL EVIDENCE IS ALWAYS ADMISSIBLE TO SHOW that an instrument was obtained by fraud or duress. *Ramsdell v. Edgerton*, 503.
4. EVIDENCE OF FALSE REPRESENTATIONS AS TO CREDIT OF PURCHASER of goods, made to the clerk of the vendor, is admissible as a part of the *res gesta*, though not communicated to the seller until after the sale, where similar representations were immediately afterwards made by the buyer to the vendor himself, to induce the sale. *Thompson v. Rose*, 121.
5. EVIDENCE ALIENDE IS ADMISSIBLE TO SHOW WHAT WAS THE MATTER TRIED in a former suit, the judgment in which is offered in evidence in a subsequent suit, if that fact does not appear from the record. *King v. Chase*, 675.
6. TIME BOOK OF A PLAINTIFF, KEPT IN TABULAR FORM, in which the days of the month are placed at the head of the column, and the name of the workman at the side, and at the end of each day a figure is placed, indicating that the person has worked the whole or a part of such day, verified by the plaintiff's oath, is admissible to prove the amount of his own labor, as well as that of his apprentice. *Mathes v. Robinson*, 505.
7. ACCOUNT BOOKS, VERIFIED BY OATH, ARE NOT SECONDARY EVIDENCE, nor to render the same admissible is it necessary to show the loss of other evidence. *Id.*
8. CERTIFICATE OF LAND OFFICE IS EVIDENCE under the statutes of Mississippi. *Doe v. Parker*, 614.
9. TESTIMONY OF WITNESSES RESIDING ABROAD.—The law of nations requires that the courts of different countries assist each other in obtaining evidence in furtherance of justice; and when the evidence of a foreign witness is required, the court wherein the action is pending may send to a court where the witness resides, a writ or letter rogatory asking the latter court to cause the deposition of the witness to be taken in due course of law. This practice of issuing letters rogatory and obtaining the evidence of foreign witnesses does not seem to have been exercised by the common law courts. They for a long time resorted to various devices, however, to compel assent to the examination of foreign witnesses. *Ex parte Harkins*, 38.
10. DEPOSITION IN A CRIMINAL CASE could not, at the common law, be taken and read in evidence, unless by consent. Such deposition can not be taken in this state, there being no statute to authorize it. *Id.*
11. PARTY OFFERING EVIDENCE APPARENTLY UNCONNECTED WITH THE ISSUE, if it is opposed, should show its connection with other facts, either in evidence or intended to be given, otherwise the court may lawfully reject it. *Crenshaw v. Davenport*, 56.

12. WHERE TESTIMONY MAY ADMIT OF DIFFERENT AND DISTINCT CONSTRUCTIONS, it is the province of the jury to adopt that construction which is most satisfactory to their minds. *Coke v. Hunt*, 589.
 13. PAROL EVIDENCE IS INADMISSIBLE TO SHOW that of those who signed a promissory note as principals, some were merely sureties for the others. *Exeter Bank v. Stowell*, 716.
 14. DECLARATIONS MADE BY OWNER OF CHOSE IN ACTION are not admissible to affect the rights of one who derives title from him. And, therefore, the declarations of a mortgagee that the mortgage was usurious, can not be admitted to affect the title of a purchaser under it, although such mortgagee died before the trial. *Stark v. Boswell*, 752.
 15. DEPOSITIONS SENT TO A JURY, WHICH CONTAIN IMPROPER MATTER, will vitiate the verdict, unless the same are wholly immaterial, or were sent through mistake. *Kittredge v. Elliott*, 717.
- See ACKNOWLEDGMENTS, 3; AGENCY, 2; ALTERATION OF INSTRUMENTS, 5; ASSUMPSIT, 2; ATTACHMENTS, 18; BANKS AND BANKING, 2, 12, 13; COMMON CARRIERS, 14; CONTRACTS, 2; CRIMINAL LAW, 6; DAMAGES, 2; DEDICATION, 2; ESTATES OF DECEASED PERSONS, 2; EXECUTIONS, 12, 33; EXECUTORS AND ADMINISTRATORS, 4, 12; GAMING, 2; INSANITY; JUDGMENTS, 4-7; LANDLORD AND TENANT, 3; MALICIOUS PROSECUTION; MORTGAGES, 1; NEGOTIABLE INSTRUMENTS, 14; NEW TRIAL, 2, 4; NUISANCES; PLEADING AND PRACTICE, 10-12; PROCESS, 1; SLANDER; STATUTE OF FRAUDS, 5; SURETYSHIP, 7; TROVER, 2; WATERCOURSES, 8.

EXECUTIONS.

1. BALANCE REMAINING IN HANDS OF REGISTER IN CHANCERY MAY BE GARNISHED as the property of the defendant in execution, where he has been ordered to sell land and pay off a mortgage, even though he has not yet reported to the court and the sale been confirmed. *Langdon v. Lockett*, 78.
2. EXECUTION DELIVERED TO SHERIFF BEFORE LEVY OF DISTRESS WARRANT for rent, but not levied until afterwards, takes precedence of the distress warrant if the goods have not been actually sold thereunder. *Rogers v. Dickey*, 204.
3. EXECUTION FIRST DELIVERED TO SHERIFF TAKES PRECEDENCE over one subsequently delivered but first levied if the property has not been sold under the latter writ before the first is levied; otherwise if there has been a sale. *Id.*
4. EXECUTION AND JUDGMENT LIENS DISCUSSED at length *per Young, J.* *Id.*
5. PROPERTY IN THE CUSTODY OF THE LAW CAN NOT BE LEVIED ON, seized, or sold under an execution. Purchaser of such property is a purchaser *pendente lite*. *Hackley v. Swigert*, 256.
6. PURCHASER UNDER AN EXECUTION OF PROPERTY IN LITIGATION, who is compelled to surrender such property by order of the court, may maintain *assumpsit* for the purchase price against the plaintiff in execution, or the defendant who directed the levy, and in satisfaction of whose debt such purchase price was applied. *Id.*
7. WHETHER A STRANGER, WHOSE PROPERTY HAS BEEN SOLD under an execution, can maintain *assumpsit* against the defendant whose debt has been paid thereby, *quare*. *Id.*

8. GROWING CORN IS A CHATTEL, AND SUBJECT TO SALE under execution. *Thompson v. Craigmyle*, 240.
9. PURCHASER OF GROWING CROP, SOLD UNDER AN EXECUTION, may enter and remove the crop purchased, although the same is in the possession of a third party, under an arrangement with the judgment debtor, made for the purpose of defrauding the latter's creditors. *Id.*
10. WORD "LEVY" IN A RETURN TO A FIERI FACIAS sufficiently indicates that there has been a seizure of the property of which the levy is predicated. *Byer v. Ebyre*, 410.
11. TITLE OF A PURCHASER AT AN EXECUTION SALE DEPENDS in no wise upon the officer's return, but instead upon the fact of there having been a seizure and sale; therefore, if the return does not show the existence of these facts, they may be shown by evidence *aliunde*. *Id.*
12. IN TRESPASS AGAINST SHERIFF FOR ILLEGAL SEIZURE by his deputy, evidence may be admitted to show the manner in which the act was committed, and all the concomitant circumstances. *Pascal v. Ducros*, 294.
13. SHERIFF MUST SEIZE ONLY DEFENDANT'S PROPERTY.—In cases of doubt he is to ascertain who is the real owner; and if after having been warned by the real owner and indemnified by the creditor, he proceeds with the levy, he is liable in damages, and the jury are to take into consideration the manner in which the seizure was made. *Id.*
14. OMISSION OF WORDS "AFORESAID PROPERTY" IN A FORTHCOMING BOND after the words "shall have forthcoming and deliver," does not vitiate the bond, as these words will be supplied by intendment. *Doe v. Parker*, 614.
15. INDULGENCE GIVEN TO PURCHASER AT AN EXECUTION SALE BY THE SHERIFF is not binding upon the plaintiff in execution, and does not affect him with any responsibility to his judgment debtor. *Hardisty v. Wilson*, 439.
16. BID AT AN EXECUTION SALE, if not paid within a reasonable time, may be disregarded and a resale of the property had. The bidder acquires no property before he has paid his bid. *Id.*
17. BID AT AN EXECUTION SALE does not discharge the debt or any portion thereof before payment. *Id.*
18. IN SHERIFFS' SALES, LAND MUST BE SUFFICIENTLY DESIGNATED or described; and no land passes unless described with reasonable certainty. *Rector v. Hart*, 650.
19. LAND IS SUFFICIENTLY DESCRIBED IN SHERIFF'S SALE when a quarter section is sold as described on the public survey; though a part of the tract is covered with the plat of a town; the defendant being the owner of the entire quarter section, with the exception of one lot, and the streets and alleys being unopened, designated by no monuments, covered with brush and timber, and there being but a single highway through it. *Id.*
20. SALES IN MASS BY SHERIFF, of distinct parcels of real estate, are not *ipso facto* void; the act concerning executions (Rev. Code, 1825, sec. 13), providing that real estate levied upon shall be divided when sold, is directory merely, and a violation of its injunctions will not make a sale void, although it may be good cause for setting it aside on proper application. *Id.*
21. *IDEM*.—Sales in mass by a sheriff, of distinct parcels of real estate, may be set aside on motion, or by a bill in chancery. *Id.*

22. SHERIFF MAY RESELL, WHERE PURCHASER AT AN EXECUTION SALE REFUSES to comply with his contract. *Robinson v. Garth*, 47.
23. SHERIFF MAY SUE FOR BREACH OF CONTRACT where purchaser at execution sale refuses to comply with his contract; so also may the plaintiff in execution. *Id.*
24. PURCHASER AT AN EXECUTION SALE WHO HAS DISCOURAGED COMPETITION thereat by his representations, will have his purchase set aside at the instance of the execution debtor or of his creditors. *Buntz v. Cole*, 226.
25. PURCHASER AT AN EXECUTION SALE whose purchase is set aside is entitled to be reimbursed the amount that he has paid, and has a lien upon the land for such amount. *Id.*
26. OBJECTION TO SHERIFF'S SALE, BECAUSE ON CREDIT, CAN NOT BE MADE, after the party objecting has confirmed it by his own acts. *Tooley v. Gridley*, 628.
27. CONFIRMATION OF SHERIFF'S SALE BY PARTIES THEMSELVES, by their own acts, is as valid as if by the court. *Id.*
28. SHERIFF'S SALE IS SUFFICIENTLY CONFIRMED BY COMPLAINANT when he makes no objection to the sale for any reason, but accepts the purchaser's bond, and issues executions upon it after it ripened into judgment. *Id.*
29. CONFIRMATION OF REPORT OF SHERIFF'S SALE IS USUALLY NECESSARY to its validity. *Id.*
30. PURCHASER OF LAND AT AN EXECUTION SALE, WITH NOTICE of a prior equitable estate in such land, takes subject to such equity. *Halley v. Oldham*, 262.
31. SALE AND CONVEYANCE UNDER AN EXECUTION relate back to the time the execution was placed in the officer's hand, so as to defeat a subsequent conveyance of the legal title, even to the holder of a prior equity. *Id.*
32. BONA FIDE PURCHASER, WITHOUT NOTICE, AT AN EXECUTION SALE, before he receives a sheriff's deed, is not the holder of a merely equitable estate, but of an inchoate legal title, and is not affected by notice subsequently acquired of a prior equity. *Id.*
33. EVIDENCE OF TITLE IN DEFENDANT IN EXECUTION at the time of the sale is not necessary in an action against him by the purchaser under the execution. *Doe v. Parker*, 614.
34. WHERE PURCHASER AT SHERIFF'S SALE IS ONE OF THE DEFENDANTS in the execution, the sale is nevertheless valid. *Id.*
- See ATTACHMENTS, 10; CORPORATIONS, 25; DEDICATION, 3; EQUITY, 5; INDEMNITY, 4, 5; JUDGMENTS, 12; JURISDICTION; MORTGAGES, 3; PROCESS, 3; STATUTE OF FRAUDS, 4-6.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTOR CAN ADMINISTER ONLY UPON PROPERTY SITUATE WITHIN THE STATE from whose courts he derives his powers. *Packwood's Succession*, 341.
2. CREDITORS MAY LOOK TO THE EXECUTOR AS THE PROPER REPRESENTATIVE of the estate, until he has been duly discharged, especially when the heir resides out of the state. *N. O. & C. R. R. Co. v. Kerr*, 323.
3. HUSBAND OF ADMINISTRATRIX IS NOT STRICTLY AN ADMINISTRATOR, so as to render a claim against him for moneys received from the intestate's estate a preferred claim against his own estate under the Illinois statute, though

- a court of equity may perhaps declare him so to be to carry out the intent of the statute. *Davis v. Harkness*, 184.
4. POWER OF SALE IN AN EXECUTOR, TO BE EXECUTED WITHIN A GIVEN TIME, does not necessitate the execution of a deed within that period, if the sale itself has been within it; and parol evidence is admissible to show that a deed dated after the expiration of the period is in consummation of a sale made within the period. *Harlan v. Brown*, 436.
 5. PROVISIONS OF PRIVATE ACT EMPOWERING ADMINISTRATOR TO SELL the decedent's land are as imperative and require as entire obedience as those of the general law in ordinary cases. *Williamson v. Williamson*, 636.
 6. WHERE ADMINISTRATOR HAS FAILED TO GIVE BOND, with the conditions prescribed by the terms of the act empowering him to sell, the sale is void. *Id.*
 7. PERSONS PURCHASING AT VOID ADMINISTRATOR'S SALE will be declared trustees for the parties injured. *Id.*
 8. PURCHASER FROM ONE WHO HAS NO TITLE does not acquire any title, though he acted in good faith, paid a valuable consideration, and had no notice. Thus a *bona fide* purchaser at an executor's sale, when the latter had no power to sell, acquires no title. *Id.*
 9. ACCOUNT SHOULD BE DIRECTED, in a suit to set aside an administrator's sale, by an heir at law, against the administrator and those claiming under the sale; and if the sale is set aside, the purchasers should be charged with a reasonable rent and interest, and will be credited with the value of permanent and valuable improvements, provided they do not exceed the aggregate value of the rents. *Id.*
 10. PRIVATE ACT EMPOWERING ADMINISTRATOR TO SELL DECEDENT'S LAND is not unconstitutional. *Id.*
 11. ADMINISTRATOR'S OR EXECUTOR'S SALE IS VOID unless the provisions of the statute are strictly pursued. *Worton v. Howard*, 607.
 12. PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT AN EXECUTOR'S SALE WAS PRIVATE, and not public, as required by statute, where his return does not show that the sale was made according to the statute. *Id.*
- See DETINUE; HUSBAND AND WIFE, 2; NEGOTIABLE INSTRUMENTS, 28.

EXECUTORY DEVICES.

See WILLS, 3, 4.

EXPERTS.

See INSANITY.

FACTORS.

LEGAL INFERENCE, WHERE FACTOR MAKES ADVANCES, is, that they were made upon the joint credit of the personal security of the principal, and of the goods and money, that might come to hand. Factor may relinquish either without affecting his right to look to the other. *Martin v. Pope*, 66.

See LIENS, 11, 13, 14; SURETYSHIP, 5.

FALSE REPRESENTATIONS.

See EVIDENCE, 4; NEGOTIABLE INSTRUMENTS, 14; SALES, 2.

FISHERY.

See CO-TENANCY, 3; FLATS.

FLATS.

OWNER OF LAND ADJOINING TIDE-WATERS IS PROPRIETOR OF THE FLATS to low-water mark, not exceeding the distance of one hundred rods, subject to the right of free fishing of each householder in the waters covering them. But the right to erect weirs upon those flats, or to set nets or seines, "making them fast in the usual way, by grapplings to the shore," belongs exclusively to the proprietor of the flats. *Duncan v. Sylvester*, 400.

FORBEARANCE.

See CONTRACTS, 8; SURETSHIP, 4, 10.

FORECLOSURE.

See MORTGAGES, 5, 7.

FORFEITURE.

See BANKS AND BANKING, 10, 11; CORPORATIONS; QUO WARRANTO; SEAFUTES, 3.

FORTHCOMING BONDS.

See EXECUTIONS, 14.

FRANCHISES.

1. **FRANCHISES ARE PRIVILEGES CONFERRED BY GRANT** from the government, and vested in private individuals. *State v. R. E. Bank*, 109.
2. **ACTS GRANTING FRANCHISES ARE CONTRACTS**, and ought to be construed by the well-established principles which regulate contracts. *Id.*

See CONSTITUTIONAL LAW, 1; WATERCOURSES, 13.

FRAUD.

1. **GENERAL PLEA OF FRAUD IS BAD.** The party whose conduct is sought to be impeached, has a right to be apprised of the facts which constitute the alleged fraud. *Hynson v. Dunn*, 100.
 2. **PLEA SETTING UP DEFENSE OF FRAUD** in a sale, as a defense to an action for the purchase money, is bad, when it fails to allege a return of the property or an offer to return. *Id.*
- See ACCOUNT, 1; ASSIGNMENTS FOR BENEFIT OF CREDITORS; ASSUMPSIT, 2; CORPORATIONS, 2; EQUITY; EVIDENCE, 3; MORTGAGE, 1, 2; PLEADING AND PRACTICE, 27; POWERS, 1; SALES, 1.

FRAUDULENT CONVEYANCES.

1. **WHERE VENDOR OF PERSONAL PROPERTY RETAINS POSSESSION AND USE** thereof after a sale, the same as he did before, the sale will be treated as fraudulent and void as to his creditors. *Crouch v. Carrier*, 156.
2. **DEBTOR IN FAILING CIRCUMSTANCES MAY PREFER ONE CREDITOR**, and transfer to him all his property, where there are no paramount liens, and

the debt thereby intended to be secured is not disproportioned to the property received. *Stover v. Herrington*, 86.

3. PARTY HAVING CLAIM EX DELICTO IS "CREDITOR" WITHIN STATUTE OF FRAUDS OF ILLINOIS, avoiding sales in fraud of creditors. Hence, a sale made by a defendant in a pending suit for slander, with intent to defraud the plaintiff out of any judgment he may recover, is void as against such plaintiff. *Walradt v. Brown*, 190.
4. SALE MADE BY AN INSOLVENT DEBTOR, who honestly believes he shall be able to continue his business, in payment of a just debt, and without a design to give a preference, is not fraudulent within the meaning of the second section of the United States bankrupt act of 1841, although bankruptcy should immediately ensue. *Jones v. Howland*, 525.
5. WHETHER A SALE MADE BY AN INSOLVENT DEBTOR IS FRAUDULENT as giving a preference, depends upon the intent with which the act is done; such intent is to be proved, as a fact, either by direct evidence, or as the necessary and certain consequence of other facts clearly proved. *Id.*

See ATTACHMENTS, 12; TROVER, 1.

FREIGHT.

See COMMON CARRIERS, 7.

GAMING.

1. KEEPING A COMMON GAMING-HOUSE IS AN INDICTABLE OFFENSE at common law and in New Hampshire. *Lord v. State*, 729.
2. HABITUALLY PLAYING CARDS OR DOMINOS IN SUCH A HOUSE, for meat and drink, is sufficient evidence of such offense. *Id.*
3. PROOF THAT THE PERSONS FREQUENTING THE HOUSE are of the character described in the indictment, or of specific acts of cursing, swearing, quarreling, and drinking, are unnecessary. Such matters are merely descriptive, and immaterial to the offense charged. *Id.*

GARNISHMENT.

See ATTACHMENTS; EXECUTIONS.

GIFTS.

GIFT OF PRODUCE OF A FUND, without limit as to time, is a gift of the fund. *Manning v. Craig*, 739.

GROWING CROPS.

See EXECUTIONS, 8, 9.

GUARANTY.

See SURETYSHIP, 10-12.

GUARDIAN AND WARD.

1. EXPENSES OF WARD MUST BE KEPT WITHIN INCOME OF HIS ESTATE and not trench upon the capital, as a general rule at common law, though the proper court may in case of strong necessity direct an appropriation of part of the principal for that purpose. *Davis v. Harkness*, 184.

2. **GUARDIAN CAN NOT EXPEND WARD'S MONEY FOR MAINTENANCE WITHOUT AN ORDER** of the probate court under the Illinois statute, although in case of strong necessity the court of chancery may allow him for indispensable expenses incurred without such order, even though it may be necessary to break in on the principal. *Id.*

See INFANCY; INSANITY, 4, 5.

HUSBAND AND WIFE.

1. **COVENANTS IN MARRIAGE ARTICLES, INTENDED TO SURVIVE THE MARRIAGE**, and not to be performed until its termination, do not come within the principle by which the marriage of a woman to her debtor is an extinguishment of the debt. *Mitchel v. Mitchel*, 237.
2. **AFTER THE WIFE'S DEATH, THE RIGHT OF ACTION TO ENFORCE SUCH COVENANTS** survives to her personal representatives, and not to her legatees. *Id.*
3. **DECLARATION IN AN ACTION BY A WIFE'S ADMINISTRATOR TO ENFORCE MARRIAGE ARTICLES**, by which the husband covenanted to perform certain dispositions by will, to be made by her, need not allege non-performance of such dispositions by non-payment to her legatees. *Id.*
4. **WHERE MAN ON EVE OF MARRIAGE AGREES IN WRITING TO PAY TO HIS INTENDED WIFE** at the rate of a certain sum per week as long as she shall remain his wife, this contract will be construed as providing for the payment of a sum of money after the termination of the coverture; and commissioners upon insolvent estates, having, by the laws of Connecticut, the powers of courts of law and of chancery, ought to allow the claim of the widow made under such contract. *Brown v. Slater*, 136.
5. **LAWS OF LOUISIANA GOVERN THE MATRIMONIAL COMMUNITY OF GAINS OF MARRIED PERSONS** from the time of their arrival within the state, but cease upon their removal. *Packwood's Succession*, 341.
6. **TRESPASS LIES AGAINST HUSBAND AND WIFE** for a wrongful act committed by them jointly. *Conwell v. Brookhart*, 244.

IMPOSTS.

See TAXATION, 4.

IMPROVEMENTS.

See CO-TENANCY, 1, 2; DEEDS, 4; EXECUTORS AND ADMINISTRATORS, 9; PARTITION, 1; PUBLIC LANDS.

INCUMBRANCES.

See WATERCOURSES, 6.

INDEMNITY.

1. **PARTY CAN NOT RECOVER UPON A COVENANT, OR BOND TO INDEMNIFY**, unless he has been actually damaged. A mere allegation that the complainants are threatened with a suit at law upon a claim included in the indemnity, is not sufficient to justify a recovery, and hence is no breach of the condition of the bond. *Michigan State Bank v. Hastings*, 549.

2. WHERE AN AGREEMENT TO INDEMNIFY IS PART OF THE CONSIDERATION for sale of land, no lien attaches before a breach of the covenant to indemnify. *Id.*
 3. COURT OF EQUITY WILL NOT DECREE A SPECIFIC PERFORMANCE OF A CONTRACT TO INDEMNIFY AND SAVE HARMLESS, before the party has been actually damaged. *Id.*
 4. PLAINTIFF MAY INDEMNIFY A SHERIFF FOR LEVYING and selling property supposed to belong to the defendant, but in the possession of, and claimed by another. *Previtt v. Garrett*, 40.
 5. BOND OF INDEMNITY IS ILLEGAL AND VOID AND CAN NOT BE ENFORCED, that is to save a sheriff harmless for levying upon and selling the property of a stranger to the judgment, and not supposed to belong to the defendant in execution. *Id.*
 6. AGREEMENT TO INDEMNIFY ANOTHER FOR COMMISSION OF TRESPASS is not illegal, where the act is not, at the date of the agreement, known to be a trespass. *Marcy v. Crawford*, 158.
- See DEEDS, 7; EXECUTIONS, 13; NEGOTIABLE INSTRUMENTS, 6; STATUTE OF FRAUDS, 3.

INDICTMENTS.

See COMMON CARRIERS, 13; CRIMINAL LAW; GAMING.

INDORSEMENTS.

See NEGOTIABLE INSTRUMENTS.

INEVITABLE ACCIDENT.

See COMMON CARRIERS, 2-5.

INFANCY.

1. STRANGER TAKING POSSESSION OF INFANT'S ESTATE WITHOUT APPOINTMENT as guardian, merely as husband of such infant's mother who was administratrix of the father, will be held liable as guardian in a court of equity, so as to constitute the infant's claim against him a preferred claim against his estate under the Illinois statute. *Davis v. Harkness*, 184.
2. COURT OF CHANCERY WILL NOT ALLOW FOR MAINTENANCE BEYOND INCOME of an infant's estate to one who, as husband of the mother of such infant, takes possession of the whole estate and appropriates it to his own use, without any appointment as guardian and without rendering any account. *Id.*
3. JUDGMENT AGAINST AN INFANT IN AN ACTION OF PARTITION, for whom no guardian *ad litem* has been appointed, is not void, and can only be taken advantage of by such infant or his privies in blood, by writ of error. *Austin v. Charlestown Female Seminary*, 497.

See NEGLIGENCE.

INJUNCTIONS.

EQUITY WILL GRANT AN INJUNCTION, ALTHOUGH THE STATE IS DIRECTLY INTERESTED in having the act done, upon a case showing an entire want of authority on the part of the officer about to do the act, and where the injured party would be left remediless. *Michigan State Bank v. Hastings*, 549.

See JUDGMENTS, 8, 9.

INNKEEPERS.

See COMMON CARRIERS, 13; INNS.

INNS.

NO ONE CAN LAWFULLY ASSUME THE CHARACTER OF INNKEEPER in Maine, unless he has first obtained a license therefor according to the provisions of the statute; and it makes no difference that he lives in a part of the state where there are no such officers as the law requires to give a license. *Lord v. Jones*, 391.

INSANITY.

1. **OPINIONS OF PROFESSIONAL MEN ON QUESTION OF INSANITY**, based upon facts proved at the trial, without any personal examination of the party, are competent evidence. *Commonwealth v. Rogers*, 458.
2. **PROFESSIONAL WITNESSES ARE NOT TO JUDGE OF THE TRUTH OF TESTIMONY**, upon which their opinions on a question of insanity are based. *Id.*
3. **PROPER QUESTION TO PUT TO MEDICAL EXPERT**, whose opinion is sought on a question of insanity, is to ask him, if the symptoms and indications, testified to by other witnesses, are proved to the satisfaction of the jury, whether in his opinion the party was insane, and what was the nature of his insanity; what state of mind the symptoms indicate, and what the witness would expect the party's conduct to be if the party would be in any supposed circumstances. *Id.*
4. **SPECIAL STATUTE AUTHORIZING GUARDIAN OF INSANE PERSON TO SELL CERTAIN REALTY** of his ward, and to apply the proceeds to the discharge of incumbrances on other realty, is constitutional and valid. *Davison v. Johannot*, 448.
5. **APPOINTMENT OF GUARDIAN OF INSANE PERSON** is not invalidated by want of notice to the alleged insane person of the time when the decree should be entered, where there is no other irregularity, the party having had due notice of the proceedings before inquisition, and having appeared and been fully heard on the application to declare him *non compos mentis*. *Id.*

See CRIMINAL LAW, 1-6.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSTRUCTIONS.

See CRIMINAL LAW, 44; PLEADING AND PRACTICE, 2.

INSURANCE—FIRE.

1. **REPRESENTATIONS MADE BY AN ASSURED, IN HIS APPLICATION FOR A POLICY** of insurance, which provides for the avoidance of the policy if such representations are false or insufficient, should be considered as part of the contract of insurance, to the same effect as if they were recited and set forth at large in the policy. *Houghton v. Manfre' Mut. F. Ins. Co.*, 489.
2. **REPRESENTATIONS MADE IN AN APPLICATION FOR INSURANCE, IN GOOD FAITH**, and without intent to deceive, are sufficient, if they are substan-

tially true and correct as to existing circumstances, and are substantially complied with, so far as they are executory and regard the future; and if, subject to the above qualifications, the representations, in any particular material to the risk, do not contain a just, full, and true exposition, the company is not bound. *Id.*

3. KNOWLEDGE BY AN APPLICANT, THAT CERTAIN REPRESENTATIONS MADE by him were false, is a question of fact for the jury. *Id.*
4. PROVISION OF A POLICY, REQUIRING THAT IF THE CIRCUMSTANCES AFFECTING THE RISK shall be altered by the assured, so as to increase the risk, without the consent of the underwriters, the policy shall be void, binds the assured, not only not to make any alteration in the use of the property, which will increase the risk, but also from the discontinuance of any precaution, represented in the application to be adopted with a view to diminish the risk, and a failure to substantially comply with such provision will release the underwriters. *Id.*
5. REPRESENTATIONS ARE TO BE CONSTRUED WITH REFERENCE to the requirements of the underwriters, and a mere literal conformity therewith is not necessarily sufficient. *Id.*
6. REPRESENTATION BY AN ASSURED, THAT THE PROPERTY IS EXAMINED thirty minutes after work, necessitates an examination after extra, as well as after ordinary, working hours. *Id.*
7. TIME THAT WORK CEASES IS A QUESTION OF FACT for the jury. *Id.*

INSURANCE—MARINE.

1. LOSS OCCASIONED BY MISCONDUCT OF INSURED, where the misconduct amounts to barratry, is not within the terms of a policy, where there is no express insurance against barratry. *St. Louis Ins. Co. v. Glasgow*, 661.
2. NEGLIGENCE OR MISCONDUCT ON THE PART OF THE INSURED or his servants or agents, will not exempt the underwriters, where the loss is occasioned by a peril insured against. *Id.*
3. INSURED MUST PROVIDE VESSEL WITH COMPETENT MASTER; and if he fails to do this, he must bear the loss resulting from the incompetency; but when he has selected a master of ordinary prudence and skill, he has complied with his whole duty, and he does not warrant that during the voyage the master shall not be guilty of negligence, unskillfulness, or misconduct. *Id.*
4. WARRANTY THAT BOAT SHALL BE COMPETENTLY PROVIDED WITH MASTER, officers, and crew, is not broken by laying the boat on the dock for repairs, and giving her over to the control of workmen or laborers. *Id.*
5. DECLARATION ON POLICY OF INSURANCE SHOULD AVEE that the boat was competently provided with master, officers, and crew, when the assured agrees that the boat shall be so provided. *Id.*
6. UPON FAILURE OF NEGOTIATIONS FOR AN AMICABLE ADJUSTMENT OF LOSSES between insurer and assured each is remitted to his original legal rights. *Natchez Ins. Co. v. Stanton*, 592.
7. POLICIES OF INSURANCE CREATE RECIPROCAL RIGHTS AND OBLIGATIONS which require the utmost good faith in both parties. *Id.*
8. CERTAIN WARRANTIES ARE IMPLIED ON THE PART OF THE ASSURED, and are as binding as though expressed; such as seaworthiness, not to deviate, and that the goods shall be properly stowed. *Id.*

9. ANY VOLUNTARY DEVIATION IS A CHANGE OF THE RISK; it forms a departure from the contract, and an attempt to substitute another. It is not necessary that the risk should thereby be increased; it is sufficient that it be changed. *Id.*
10. EFFECT OF A DEVIATION IS TO DISCHARGE THE UNDERWRITERS. The owner of the ship, by his breach of the implied warranty against deviation, becomes liable to the owner of the goods for their loss. *Id.*
11. TAKING A BRIG IN TOW BY A STEAMER IS A DEVIATION BY THE LATTER, there being nothing in the policy which expressly authorized it. *Id.*
12. MASTER AND MARINERS OF A VESSEL ARE THE AGENTS AND SERVANTS OF THE OWNERS of the cargo as well as of the owners of the vessel, hence a deviation by them discharges an insurance on the cargo. *Id.*
13. UNDERWRITERS ARE LIABLE FOR A LOSS THE PROXIMATE CAUSE OF WHICH is one of the enumerated risks, though the remote cause may be traced to the master and mariners; but a voluntary deviation by the master is not such a remote cause as to bring it within the rule. *Id.*
14. INSURER IS LIABLE FOR EXTRAORDINARY PERILS ONLY, unless by express stipulation, and not for such as proceed from the negligence, unskillfulness, or misconduct of the master and crew. *Id.*
15. ADVERTISEMENT THAT COMPANY WOULD INSURE GOODS on certain enumerated boats amounts only to a waiver of the implied warranty of seaworthiness. *Id.*
16. USAGE OF TOWING BOATS BY STEAMERS ON THE MISSISSIPPI could not affect a contract of insurance made at Natchez, unless shown to be so general and well known that it was fair to presume the parties contracted with reference to it. *Id.*
17. POLICY OF INSURANCE, MADE IN THE NAME OF A PARTICULAR PERSON, who is the owner of a small proportion of the property insured, can not be made to cover the interest of others upon parol proof that the application for insurance was for such others, as well as for the party named, and that this was well known to the insurers, and that it was the intention of all the parties that the policy was to cover the interest of all the owners. *Finney v. Bedford Commercial Ins. Co.*, 515.
18. DECLARATION ON A POLICY OF INSURANCE, which joins as plaintiffs persons whose interests are not covered by the policy, may be amended by striking out the names of such parties. *Id.*

INTEREST.

See BANKS AND BANKING, 5; EXECUTORS AND ADMINISTRATORS, 9; NEGOTIABLE INSTRUMENTS, 11; SURETSHIP, 3, 7.

INTERPLEADER.

See PLEADING AND PRACTICE, 6-8.

JUDGMENTS

1. JUDGMENT IS BUT A SECURITY FOR A DEBT, and the payment of the debt is the object of the lien. *Planters' Bank v. Calvit*, 616.
2. LIEN OF JUDGMENT ARISES BY MERE IMPLICATION OF LAW; and although a new judgment be predicated on the first, this does not necessarily destroy the lien which the law has given, for it is competent for the law to keep the lien in existence. *Id.*

3. DECREE IS FINAL WHEN IT ASCERTAINS ALL THE RIGHTS OF THE PARTIES in litigation, although there may be a reference to the master to ascertain facts for an account between the parties. These are ministerial acts, and do not affect the decree. *Bank of Mobile v. Hall*, 41.
 4. JUDGMENT IS CONCLUSIVE ONLY ON THE MATTER DIRECTLY IN ISSUE in that suit when offered in evidence in another suit, and the matter in issue, under this rule, is that upon which the plaintiff's action proceeds and which is controverted by the defendant's pleadings, and does not include facts offered in evidence and controverted on the trial but not directly in issue. *King v. Chase*, 675.
 5. JUDGMENT IN FAVOR OF DEPUTY SHERIFF IS CONCLUSIVE EVIDENCE FOR SHERIFF in a subsequent action, where both actions are for the seizure of the same goods. *Id.*
 6. FORMER VERDICT AND JUDGMENT ARE PLEADABLE IN BAR, OR ADMISSIBLE IN EVIDENCE, if there is no opportunity to plead them, in a subsequent action between the same parties or their privies for the same cause, and in either case are conclusive. *Id.*
 7. VALIDITY OF MORTGAGE OFFERED AS EVIDENCE OF PLAINTIFF'S TITLE IN TROVER IS NOT IN ISSUE, though it is shown by parol that it was the only question submitted to the jury, and that they found the mortgage fraudulent, and, therefore, a judgment and verdict for the defendant in that suit are not admissible in evidence in another action between the same parties for other goods claimed under the same mortgage. *Id.*
 8. JUDGMENT LIEN IS DESTROYED BY AN INJUNCTION ISSUED UPON THE EXECUTION OF A BOND with sureties by the defendant in the judgment. *Aliter* if it is a replevy bond, forthcoming bond, or a bond to try the right of property. *Bartlett v. Doe*, 52.
 9. WHERE EXECUTION SALE IS ENJOINED AT THE SUIT OF A STRANGER to the judgment, the injunction bond given by him does not destroy the judgment lien. It operates as a security for damages that may accrue by delaying the sale. *Id.*
 10. "SATISFACTION" OF JUDGMENT, WHAT IS.—"Satisfaction" is a technical term, and in its application to judgments it means the payment of the money due by the judgment, which payment must be entered of record. *Planters' Bank v. Calvit*, 616.
 11. JUDGMENT HAS ALL ITS VALIDITY PENDING ERROR. *Id.*
 12. PLAINTIFF CAN HAVE TWO JUDGMENTS at the same time for the same cause of action; but he can not have two productive judgments, nor executions of both, and can have but one satisfaction. *Id.*
 13. AFFIRMANCE OF JUDGMENT ON APPEAL, EFFECT OF.—A judgment exists as a lien from its rendition. It derives no additional force from its affirmance on appeal, even where the appellate court enters a new judgment, but is not satisfied, merged, or extinguished by the second judgment, and it retains its lien. *Id.*
 14. IT IS NO OBJECTION TO THE REVERSAL OF A JUDGMENT, that the judge who signed the bill of exceptions to the overruling of the motion for a new trial is not the same judge who presided at the trial; where he certified no new fact, but only stated that the motion for a new trial had been overruled. *Doe v. Parker*, 614.
- See AGENCY, 4; ATTACHMENT, 6-8; BONDS, 2; CORPORATIONS, 9; EQUITY, 6, 9, 10; EVIDENCE, 5; EXECUTIONS, 4; INFANCY, 3; MORTGAGES, 3; NOTION,

1; PARTITION, 2; PLEADING AND PRACTICE, 10, 14, 15, 19, 27; STATUTE OF LIMITATIONS, 5; TROVER, 4.

JUDICIAL KNOWLEDGE.

See EVIDENCE, 1.

JURISDICTION.

CIRCUIT COURT HAS JURISDICTION TO WATCH over execution of its decrees, and to regulate all proceedings under them, until the case is finally disposed of. *Tooley v. Gridley*, 628.

See ATTACHMENTS, 12, 14; EQUITY, 7; MORTGAGES, 7.

JURY AND JURORS.

1. RIGHT OF PEREMPTORY CHALLENGE MUST BE EXERCISED BEFORE EXAMINATION of a juror as to his bias or opinions. *Commonwealth v. Rogers*, 458.
2. JURIES SHOULD NOT BE PERMITTED TO SEPARATE IN CAPITAL CASES, after they have been sworn, either with or without the consent of the prisoner. *State v. Hornsby*, 305.
3. MISCONDUCT AND ABUSE WILL ALWAYS BE PRESUMED upon a separation of the jury in a capital case. *Id.*

See CRIMINAL LAW, 36, 44, 45; EVIDENCE, 12; INSURANCE—FIRE, 3, 7; SALES, 5; SURVEY.

JUSTICES.

See ACKNOWLEDGMENTS, 2; ATTACHMENTS, 11, 12; EVIDENCE, 1; MALICIOUS PROSECUTION, 5, 6.

JUSTIFICATION.

See ATTACHMENTS, 12-14; SLANDER, 4.

LANDLORD AND TENANT.

1. AGENT ENTERING INTO POSSESSION OF LAND FOR HIS PRINCIPAL subjects himself to the law applicable to the relation of landlord and tenant, and while in such possession can not deny his landlord's title, by setting up adverse title in himself or third parties. *Farrow v. Edmundson*, 250.
2. STATUTE OF LIMITATIONS DOES NOT COMMENCE TO RUN in favor of a tenant, claiming to hold adversely, as against his landlord, until such relation is dissolved, and the landlord is notified of the dissolution. *Id.*
3. TENANT'S PUBLICLY CLAIMING LAND AS HIS OWN, selling portions of it, delivering over the possession, and continuing such acts for more than twenty years, will be presumptive evidence of a disclaimer of the landlord's title, and of an adverse holding. *Id.*

LARCENY.

See CRIMINAL LAW, 19-22.

LEGACIES.

See HUSBAND AND WIFE, 2; TAXATION, 5; WILLS, 12, 13.

LEVY.

See EXECUTIONS; TROVER, 1.

LEX DOMICILII.

See MARRIAGE AND DIVORCE; MARRIED WOMEN, 2.

LICENSES.

1. LICENSE WHICH HAS INDUCED EXPENSES ON THE PART OF THE LICENSEE can be countermanded, if at all, only by replacing the latter in his original position and repaying him the amount expended by him. *Addison v. Hack*, 421.
2. PAROL LICENSE TO DIVERT A STREAM, executed by the erection of works at a considerable expense, which must be useless if the license is destroyed, and after the consideration agreed upon for the license has been paid the licensor, becomes irrevocable. *Id.*
See COMMON CARRIERS, 12; INNS.

LIENS.

1. LIEN, AT COMMON LAW, ORIGINALLY SIGNIFIED THE RIGHT OF ARTISANS and others who have bestowed labor upon or done some act in reference to a thing, to retain it until they are reimbursed for their expenditures and labor bestowed thereon. *Oakes v. Moore*, 379.
2. NO LIEN IS ACQUIRED, WITHOUT A SPECIAL CONTRACT THEREFOR, in a case where one agrees to cut timber on the land of another and deliver it at a certain place, there to be cut into boards, the price to be paid at stated times after such delivery, and at a certain amount per thousand feet of boards. *Id.*
3. NO LIEN IS EFFECTUAL UNLESS IT IS ACCOMPANIED BY POSSESSION, and the moment possession is voluntarily surrendered the lien is gone. *Id.*
4. PERSON WITH WHOM LAME HORSE IS LEFT TO BE KEPT AND CURED has a lien, in the character of a farrier, upon the horse for his cure and keeping. And such person can not be considered as having waived his lien by agreeing to buy the horse from one who had no authority to sell him. *Lord v. Jones*, 391.
5. VENDOR OF REALTY WAIVES HIS LIEN BY TAKING SECURITY for the purchase money other than the purchaser's own obligation. The lien is, therefore, waived by taking from the purchaser notes of third persons payable to him at a future day and assigned by him to the vendor. *Conover v. Warren*, 196.
6. FAILURE TO ASSERT VENDOR'S LIEN for three years furnishes a strong presumption that it is considered waived. *Id.*
7. VENDOR'S LIEN IS NOT WAIVED by taking the purchaser's note for the amount due. *Aldridge v. Dunn*, 224.
8. IDEM—NO WAIVER OF A VENDOR'S LIEN ARISES FROM AN EXTENSION OF CREDIT to the purchaser. *Id.*
9. VENDOR MAY HAVE RECOURSE IN EQUITY TO HIS LIEN after he has unsuccessfully attempted to collect the debt at law. *Id.*
10. VENDOR'S LIEN MAY BE ASSERTED AGAINST JUDGMENT CREDITORS of the purchaser, but not against *bona fide* purchasers from the latter without notice. *Id.*

11. **MERE AGREEMENT TO SHIP GOODS IN SATISFACTION OF ANTECEDENT ADVANCES** will not give the factor or consignee a lien upon them for his general balance until they come to his actual possession. *Desha v. Pope*, 76.
12. **MECHANIC'S LIEN IS NOT WAIVED** by taking the notes of the debtor, nor by giving to the latter a receipt as in full for the demand. *Goble v. Gale*, 219.
13. **FACTOR HAS A LIEN FOR A GENERAL BALANCE OF ACCOUNTS**, between himself and his principal, arising out of their dealings as principal and factor. *Martin v. Pope*, 66.
14. **GENERAL LIEN OF FACTORS DOES NOT DEPEND UPON EXPRESS CONTRACT**, but rests upon its manifest tendency to aid the interests of trade and commerce. It is presumed to exist until the contrary is established. *Id.*
See ATTACHMENTS, 9, 15; CONTRACTS, 3; EXECUTIONS, 4, 25; INDEMNITY, 3; JUDGMENTS, 1, 2, 8, 13; MORTGAGES, 2, 3; SURETSHIP, 5; TROVER, 3.

MALICE.

See SLANDER.

MALICIOUS PROSECUTION.

1. **WARRANT OF ARREST IS ADMISSIBLE IN EVIDENCE** in an action for a malicious prosecution, although the offense is not legally set forth in the warrant. *Williams v. Vannmeter*, 644.
2. **IN ACTION FOR MALICIOUS PROSECUTION PLAINTIFF MUST SHOW** a want of probable cause, and malice, either express or implied, in the defendant. Malice may be inferred from the want of probable cause, but the want of probable cause can not be inferred from malice, however rancorous. *Id.*
3. **SLIGHT EVIDENCE OF WANT OF PROBABLE CAUSE** is required, as it involves a negative. *Id.*
4. **ACQUITTAL OF PLAINTIFF IS EVIDENCE** of the want of probable cause to go to the jury, but of itself, without other circumstances, is not sufficient. *Id.*
5. **IN ACTION FOR MALICIOUS PROSECUTION**, the answer of the justice who issued the warrant of arrest to a question asked by the defendant as to what he (the justice) thought of the plaintiff, and whether he was not subject to the vagrant law, is admissible in evidence as a part of the *res gesta*. *Id.*
6. **INDUCEMENTS, HOWEVER STRONG, HELD OUT BY THE JUSTICE TO DEFENDANT** to institute the prosecution, are inadmissible to disprove malice, or in mitigation of damages. *Id.*

MANSLAUGHTER.

See CRIMINAL LAW, 37-39.

MARRIAGE AND DIVORCE.

MARRIAGE IN MISSISSIPPI, WITH THE INTENTION OF MAKING LOUISIANA THE RESIDENCE of the parties, and removing there within a reasonable time in pursuance of such intention, is governed by the laws of the latter place with respect to the wife's separate property at the time of the marriage. *Routh v. Routh*, 326.

See CRIMINAL LAW, 16, 17.

MARRIAGE SETTLEMENTS.

See HUSBAND AND WIFE, 4.

MARRIED WOMEN.

1. SEPARATE TITLE TO HALF THE COMMUNITY PROPERTY DOES NOT VEST IN THE WIFE immediately upon the removal of the parties from Louisiana, but only upon the death of one of them; until then the husband has full control, except he can not alienate in fraud of her rights. *Packwood's Succession*, 341.
2. PERSONAL PROPERTY HAS NO OTHER SITUS THAN THE DOMICILE OF THE PARTIES; hence the proceeds of community property situate in Louisiana, and placed in the bank there to the husband's credit, can not upon the death of the wife, the parties residing in New York, be administered on in Louisiana as part of her estate there. *Id.*
3. MARRIED WOMAN MAY, WITH THE CONSENT OF HER HUSBAND, dispose of her choses in action, or property held in trust for her by her husband, by will. *Reed v. Blaisdell*, 722.
4. SUCH CONSENT OF THE HUSBAND WILL BE PRESUMED from the fact that at the execution of the will he stood by and assented and advised as to the making. *Id.*
5. WILL OF A MARRIED WOMAN, VALID AS TO THE DISPOSITION of personal property, but not as to real, may be admitted to probate for the former, although not for the latter. *Id.*

MASTER AND SERVANT.

MASTER IS NOT LIABLE TO SERVANT FOR NEGLIGENCE OF FELLOW-SERVANT engaged in a particular business, although the latter be the foreman in charge of it. *Brown v. Maxwell*, 771.

MECHANIC'S LIEN.

See LIENS, 12.

MERGER.

See CRIMINAL LAW, 18.

MILLS.

See WATERCOURSES.

MISJOINDER.

See PLEADING AND PRACTICE, 28.

MISTAKE.

See ACCOUNT, 1; ASSUMPSIT, 1; EQUITY, 2, 5.

MORAL OBLIGATIONS.

See CONTRACTS, 7.

MORE OR LESS.

See DEEDS, 5, 6.

MORTGAGES.

1. MORTGAGE WHICH DOES NOT EXPRESS THE TRUE CONSIDERATION (which fact only appears by testimony *aliunde*), is not conclusively fraudulent, but the existence of fraud must depend upon the intention of the parties, as shown from the proofs, or inferred from established facts. *Stover v. Herrington*, 86.
2. MORTGAGEE, BY PURCHASING TWO SLAVES INCLUDED IN HIS MORTGAGE, DOES NOT IMPAIR his lien as to the others. The intent thereby to defraud other creditors of the mortgagor can not be inferred, but only that he thought the security sufficient for his indemnity without these slaves. *Id.*
3. MORTGAGEE IS NOT ESTOPPED FROM SHOWING THAT HE NEVER INTENDED TO ABANDON THE MORTGAGE by obtaining a judgment and execution for the debt intended to be secured, and causing the mortgaged property to be levied on and sold, and becoming himself the purchaser, under the false impression that such sale drew with it the lien of the mortgage, and was superior to liens attaching after the execution of the mortgage, and before the levy of the execution. *Id.*
4. MORTGAGE GIVEN BY BANKRUPT TO BONA FIDE CREDITOR, upon his solicitation, within two months before the filing of a petition against such bankrupt, under the bankrupt act of 1841, is not void as being made in contemplation of bankruptcy, where the bankrupt testifies that though he was then deeply insolvent, he thought himself able to pay his debts, and so represented to the creditor, and that he did not then intend or expect to be thrown into bankruptcy. *Dow v. Sargent*, 684.
5. ANSWER IN FORECLOSURE SUIT MAY SET UP AGREEMENT SUBSEQUENT to the execution of the mortgage, whereby the mortgagee was to surrender the mortgage and notes upon a conveyance in fee of part of the premises, and show that the defendant has performed the same by executing and tendering such a conveyance, which, being refused by the complainant, is brought into court, and if the defense is sustained the bill must be dismissed, though the defendant can not, without a cross-bill, have the notes surrendered and the mortgage canceled. *Tarleton v. Viles*, 193.
6. RELEASE OF THE DEBT OR OTHER THING SECURED by a mortgage is a release of the mortgage. *Smith v. Durell*, 732.
7. CIRCUIT COURT HAS JURISDICTION OF SUIT FOR FORECLOSURE of mortgage. *Tooley v. Gridley*, 628.

See ACKNOWLEDGMENTS, 1; CONTRACTS, 3; EQUITY, 5; EVIDENCE, 14; JUDGMENTS, 7.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 22-25; TAXATION, 1, 2, 7.

MURDER.

See CRIMINAL LAW.

NEGLIGENCE.

PLAINTIFF SUING FOR NEGLIGENCE, MUST HIMSELF BE WITHOUT FAULT; and the fact that he is an infant, does not prevent the application of this rule. *Brown v. Maxwell*, 771.

See CORPORATIONS, 5, 14; INSURANCE—MARINE, 2, 14; MASTER AND SERVANT; NUISANCE, 1.

NEGOTIABLE INSTRUMENTS.

1. DATE IS NOT NECESSARY TO VALIDITY OF NOTE. The date, none being named, is computed from the delivery or issuing of the note. *Inglish v. Brexeman*, 96.
2. BILLS OF EXCHANGE ARE ASSIGNABLE BY CUSTOM OF MERCHANTS; our statute only confirms the negotiability of such instruments as it existed by the *lex mercatoria*. *Buckner v. E. E. Bk.*, 106.
3. TRANSFER OF BILLS PAYABLE TO ORDER is properly by indorsement; though in cases where an indorser is necessary no particular form of words is required. *Id.*
4. PLAINTIFF SUING UPON BILL OF EXCHANGE MUST SHOW TITLE in the same manner as every other plaintiff. *Id.*
5. RECEIPT OF NEGOTIABLE INSTRUMENT IN PAYMENT OF A PRECEDENT DEBT IS IN THE USUAL COURSE OF TRADE. If received before due, and without notice of an equity between the original parties, the holder is not affected by such equity. *Bank of Mobile v. Hall*, 72.
6. NEGOTIABLE INSTRUMENT RECEIVED AS AN INDEMNITY AGAINST POSSIBLE FUTURE LOSS, even though that loss afterwards actually occur, is not taken in the usual course of trade. It remains subject to latent equities between the original parties. *Id.*
7. WHEN NOTE IS PAYABLE AT A BANK, DEMAND, as a general rule, must be made within banking hours. *Cohen v. Hunt*, 589.
8. IF AFTER BANKING HOURS A NOTE BE PRESENTED FOR PAYMENT at a bank, at which it is payable, on the day it falls due, and the officers of such bank are in attendance, and give answer that no funds have been or are on deposit to pay it, it is a sufficient demand to charge the indorser. *Id.*
9. ACCEPTANCE OF A BILL OF EXCHANGE MAY BE MADE BY LETTER, whether written before or after such bill is drawn, although the holder was not induced by such letter to take the bill. *Reed v. Marsh*, 253.
10. DRAWER OF A BILL OF EXCHANGE UNDERTAKES TO PAY THE BILL at the place where it is drawn, upon default of the drawee, and not at the place where it is payable. *Crawford v. Branch Bank*, 33.
11. HOLDER OF A DISHONORED FOREIGN BILL OF EXCHANGE, DRAWN IN ALABAMA, MAY RECOVER from the drawer the damage and interest provided by the laws of that state. *Id.*
12. HOLDER OF A NOTE OR BILL, TRANSFERRED TO HIM BEFORE MATURITY, IN PAYMENT OF AN ANTECEDENT DEBT, shall be deemed to have received it for value, in the usual course of trade, and is entitled to recover its amount of the maker or acceptor, notwithstanding any defense which existed against the original payee. *Bostwick v. Dodge*, 584.
13. INDORSEMENT UPON AN INSTRUMENT UNDER SEAL, to enable the obligor to negotiate the same and to raise money thereon, authorizes the holder to fill in the blank above the indorsement with a promise to pay in case of default by the obligor. The liability of such an indorser is that of an original promisor. *Gist v. Drakely*, 426.
14. WHERE ONE HAS BEEN INDUCED BY FALSE REPRESENTATIONS TO INDORSE A NOTE, parol evidence is admissible to prove that fact. *Larabee v. Fairbanks*, 389.
15. WANT OF CONSIDERATION FOR INDORSEMENT MAY BE SHOWN between the immediate parties to the contract. *Id.*

16. ONE WHO WRITES HIS NAME ON THE BACK OF A PROMISSORY NOTE, prior to delivery, is an original promisor, and a failure to demand payment of such person, at the maturity of the note, will discharge an indorser. *Union Bank v. Willis*, 541.
17. DEMAND OF PAYMENT ON A PROMISSORY NOTE executed by several makers, not partners, must be made on all in order to charge an indorser. *Id.*
18. INDORSEMENT MUST BE MADE ON INSTRUMENT ASSIGNED, or on some paper accompanying it at the time the bill passes. *Buckner v. Real Estate Bank*, 105.
19. LEGAL INTEREST IN BILL IS NOT TRANSFERRED BY DEED OF ASSIGNMENT of all the debtor's property in trust for the benefit of his creditors, so as to entitle the trustees to sue in their own names. *Id.*
20. TEST OF NEGOTIABILITY OF NOTE is that it must be an undertaking to pay a certain sum at all events at some time which must certainly come, and not out of a particular fund, or upon a contingent event. *Cota v. Buck*, 464.
21. NOTE IS NEGOTIABLE THOUGH OBSCURELY AND UNGRAMMATICALLY WRITTEN, where the promise is for value received to pay a certain party or bearer a certain sum, with the following addition, "it being for property I purchased of him in value at this date, as being payable as soon as can be realized of the above amount for the said property I have this day purchased of said P., which is to be paid in the course of the season now coming." *Id.*
22. "PLACE OF PAYMENT" MEANS a place where the holder can present the note, where the maker can deposit or provide funds to meet it, and where a legal offer to pay can be made. *Montross v. Doak*, 278.
23. NAMING OF A CITY AT LARGE AS PLACE OF PAYMENT is not such an indication of the place of payment as can make it incumbent on the holder to make a demand anywhere before he can entitle himself to recover. *Id.*
24. ACTUAL PRESENTMENT OF NOTE IS UNNECESSARY, when the notary having the note in his possession, demands payment of the drawer, and the latter answers that it will not be paid. *Union Bank v. Lea*, 275.
25. HOLDER OF NOTE MUST GIVE NOTICE to every one to whom he intends to resort; he need not give it to any others. *Id.*
26. DEFENDANT SHOULD SHOW THERE WAS A NEARER POST-OFFICE than the one to which the notice was directed, in order to invalidate the notice. *Id.*
27. NOTICE OF PROTEST DEPOSITED IN THE POST-OFFICE at Providence, where the note was payable and protested, is sufficient, if it is shown that the residence of the person to be notified is fifteen miles from there, but that he receives his letters at Providence. *New Orleans etc. R. R. Co. v. Kerr*, 323.
28. SERVICE OF NOTICE OF PROTEST ON AN EXECUTOR OF A DECEASED INDORSER, after the heir had come forward, been admitted as heir, given security, and taken possession of the property, but before the executor has rendered to the heir any account, or received from him the sums necessary to pay the debts, is good. *Id.*
29. HOLDER OF PROMISSORY NOTE IS NOT BOUND TO GIVE NOTICE to any except the one whom he intends to hold liable. *Union Bank v. Hyde*, 290.
30. PAYMENT BY INDORSER RAISES PRESUMPTION OF INDEBTEDNESS, and he must distinctly allege that he paid without notice of the dishonor, in order to set off the payment in a suit by the holder on another note. *Id.*

31. NOTICE OF DISHONOR OF NOTE, WHICH IS MAILED within a convenient time after the commencement of business hours on the day succeeding that of the dishonor, is sufficient to charge the indorser. *Chick v. Pillsbury*, 394.
 32. PARTIAL OR TOTAL FAILURE OF CONSIDERATION in a promissory note may, in an action at law, be legitimately introduced in evidence. *Brewer v. Harris*, 587.
 33. INDORSEMENT WRITTEN IN PENCIL, OR MADE BY A MARK, is sufficient, although it appears that the party making the mark could write. And where a person writes the figures "1. 2. 8." on the back of a bill of exchange, as a substitute for his name, intending thereby to bind himself as indorser, he will be so bound. *Brown v. B. & D. Bank*, 755.
 34. HOLDER OF A PROMISSORY NOTE IS NOT CHARGED WITH NOTICE of its invalidity, from the fact that it was indorsed to him without recourse, and upon discounting the interest thereon. *Pierce v. Ricker*, 728.
 35. WAIVER OF DEMAND AND NOTICE ON A PROMISSORY NOTE need not be in writing, and may be proved by direct evidence, or inferred from expressions and conduct of the parties. *Hibbard v. Russell*, 733.
 36. ALLEGATION OF DEMAND AND NOTICE IS PROVED BY EVIDENCE that the defendant waived it, in an action against the indorser. *Id.*
- See ALTERATION OF INSTRUMENTS; BANKS AND BANKING, 9; COMPOSITION, 1; EVIDENCE, 13; SURETYSHIP, 10-12.

NEW TRIAL.

1. NEW TRIAL IS A REHEARING OF THE CASE before another jury, but with as little prejudice to either party as if it had never been heard. It places the case exactly in the position it occupied before there had been a trial, and the party stands as if he had never been tried. *State v. Hornsby*, 314.
2. NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE should not be granted unless the testimony appears to be such as would probably produce a different verdict. *Id.*, 305.
3. NEW TRIAL TO ENABLE PARTY TO RECOVER NOMINAL VINDICTIVE DAMAGES will not ordinarily be granted, but it is otherwise where the action is brought to try a question of permanent right. *Plumleigh v. Dawson*, 190.
4. WHEN IRRELEVANT TESTIMONY IS ADMITTED AGAINST OBJECTION, a motion for a new trial, made upon a bill of exceptions, will be granted without inquiring how far such testimony may have influenced the verdict. *Myers v. Malcolm*, 744.

See CRIMINAL LAW, 15.

NOLLE PROSEQUI.

See CRIMINAL LAW, 37, 38, 40, 41.

NON-JOINDER.

See PLEADING AND PRACTICE, 5.

NON-RESIDENTS.

See ATTACHMENTS, 13; STATUTE OF LIMITATIONS, 4.

NON-USER.

See CORPORATIONS, 5, 10.

NOTICE.

1. WHERE ONE AGREES TO PAY ONE HALF OF ANY JUDGMENT that may be rendered against another for doing a particular act, no notice need be given by the latter to the former before bringing suit to recover under such agreement, of the fact that such a judgment has been rendered against him. *Marcy v. Crawford*, 158.
 2. PURCHASER, WITH NOTICE AT ANY TIME before he is clothed with the legal title of an outstanding equity, is bound by such prior equity. *Halley v. Oldham*, 262.
- See ADVERSE POSSESSION, 1, 2; ANIMALS; BANKRUPTCY AND INSOLVENCY, 1; EXECUTIONS, 30, 32; INSANITY, 5; LANDLORD AND TENANT, 2; NEGOTIABLE INSTRUMENTS; SURETSHIP, 11.

NUISANCE.

1. KEEPING OF LARGE QUANTITY OF GUNPOWDER IN WOODEN BUILDING, near other buildings, amounts to a public nuisance, and renders the person so keeping it liable for damages resulting therefrom, although he may not have been guilty of any negligence in causing the fire from which such damages resulted. *Myers v. Malcolm*, 744.
2. EVIDENCE THAT DEFENDANT WAS A MAN OF WEALTH is not admissible in an action for damages resulting from a nuisance erected and maintained by him. *Id.*

OFFICES AND OFFICERS.

- VALID ASSIGNMENT OF QUARTER'S SALARY BEFORE EXPIRATION OF QUARTER can be made by a municipal officer appointed for a year, but removable at the will of the appointing power. *Brackett v. Blake*, 442.
- See ACKNOWLEDGMENTS, 2; SHERIFFS; WITNESSES, 2.

ORDINANCES.

See CONSTITUTIONAL LAW, 5; TAXATION, 4.

PARENT AND CHILD.

- MARRIAGES OF A CHILD BELONG TO THE FATHER, and are subject to the payment of his debts, while the child remains a member of his family. *Gedfrey v. Hays*, 58.

PAROL EVIDENCE.

See EVIDENCE; NEGOTIABLE INSTRUMENTS, 14.

PARTIES.

See PLEADING AND PRACTICE, 1, 17, 26.

PARTITION.

1. PROCEEDINGS FOR PARTITION OF REALTY UNDER ILLINOIS STATUTE OF 1827 are summary and *in rem*, and act only on the legal rights of the parties in dissolving the tenancy, and the equitable right of one of them to the value of improvements erected on the common land is not thereby affected. *Louville v. Menard*, 161.

2. JUDGMENT IN AN ACTION OF PARTITION IS NEITHER VOID NOR VOIDABLE from the fact that it includes a parcel of land to which the tenants in common had no title. *Austin v. Charlestown Female Seminary*, 497.

See CO-TENANCY, 2; INFANCY.

PARTNERSHIP.

1. REAL ESTATE, PURCHASED BY A FIRM AS PARTNERSHIP PROPERTY, is liable to the payment of the partnership debts. *Divine v. Mitchum*, 241.
2. ADVANCEMENTS MADE BY ONE PARTNER TO THE FIRM, and all other firm debts, must be first discharged out of the firm property, whether real or personal, before recourse can be had to the same by the individual creditors of a partner. *Id.*
3. DORMANT PARTNER NEED NOT BE JOINED by the ostensible partner in an action upon a contract entered into by him in his own name. *Goble v. Gale*, 219.

See ATTORNEY AND CLIENT, 2.

PATENT.

See STATUTE OF FRAUDS, 2.

PAYMENT.

See BAILMENTS; NEGOTIABLE INSTRUMENTS, 5, 12; TENDER.

PERJURY.

See CRIMINAL LAW, 30; SLANDER, 2, 3.

PLEADING AND PRACTICE.

1. NEW PARTIES MAY BE BROUGHT IN AFTER A FINAL DECREE, and a reference to the master to take an account, if they affect only the account and not the merits of the action. *Bank of Mobile v. Hall*, 41.
2. AVERMENTS OF MATTERS OF SUBSTANCE IN DECLARATION need only be proved substantially, but matters of description must be proved exactly. And where *assumpsit* is brought to recover money alleged to be due from the defendant to the plaintiff, and by mistake omitted in a settlement between them, the averments of the time of such settlement, and of the particular sum due, and not embraced therein, are averments of matters of substance, not of description. *Sage v. Hawley*, 123.
3. PARTY ALLEGING ERROR AS BASIS OF ACTION must show it, or at least show satisfactorily that the evidence of it is exclusively in the power of his adversary. *Union Bank v. Hyde*, 290.
4. DEMURRER TO A PLEADING ADMITS that the facts therein set forth are true. *Sleeth v. Murphy*, 232.
5. OBJECTION OF NON-JOINDER COMES TOO LATE after an answer to the merits. *Pascal v. Ducros*, 294.
6. BILL OF INTERPLEADER IS A PROPER REMEDY when suits are either threatened, or actually pending by two different claimants against a party, claiming the same debt or duty by different or separate interests. *Yarborough v. Thomson*, 623.
7. BILL OF INTERPLEADER SHOULD BE FILED BEFORE JUDGMENT, for after the determination of the right by a judgment at law equity can not interfere. *Id.*

8. INTERPLEADER WILL NOT LIE WHEN COMPLAINANT DEFENDS against both suits; hence, where he defended both against an attaching creditor and an assignee of a note, and is unsuccessful in both suits, the bill will not lie. *Id.*
9. INSTRUCTIONS.—When instructions are given by the court, although taken separately, each might be exceptionable, yet if taken together as a whole, they contain a correct exposition of the law of the case, the judgment will not be reversed. *Williamson v. Vanmeter*, 644.
10. BILL OF EXCEPTIONS, TAKEN UPON ONE POINT ONLY, THE IMPROPER EXCLUSION of a particular item of testimony, is sufficient to reverse the judgment, if true, without stating all the evidence. *Worren v. Howard*, 607.
11. BILL OF EXCEPTIONS SHOULD CONTAIN THE REJECTED EVIDENCE that is assigned as error, when the question is whether the evidence is material to prove the issue. *Neal v. Sanderson*, 609.
12. BILL OF EXCEPTIONS NEED NOT CONTAIN THE EXCLUDED EVIDENCE assigned as error, when the question is whether any evidence can be introduced to prove a certain fact, for then the courts are only called upon to say whether it is competent to prove such fact. *Id.*
13. ATTORNEY FOR THE STATE IS THE PROPER PERSON on whom a citation of appeal from a judgment in favor of the state should be served. *State v. Plazencia*, 271.
14. FLEEING FROM JUSTICE NEITHER DESTROYS NOR IMPAIRS a party's right to appeal from a judgment against him. *Id.*
15. DUTY OF THE APPELLATE COURT is to review the legality of the proceedings of the court below, and if the trial and proceedings have been according to legal principles, then the appellate court must affirm the judgment. *Planters' Bank v. Calvit*, 616.
16. PARTY CAN NOT COMPLAIN OF SLIGHT ERROR in the appellate court when it would have been corrected below at his request. *Union Bank v. Lea*, 275.
17. RECORD IS IN ALL CASES TO DETERMINE WHO ARE PARTIES TO A CASE. *Michigan St. Bk. v. Hastings*, 549.
18. RULE ADOPTED BY A TRIAL COURT, requiring all the evidence to be offered in a case, before any question of law is raised, excepting objections to testimony, is a proper rule, and no one will be heard to complain that he has been injured because of the court's adherence thereto. *Gist v. Drakely*, 426.
19. SURETIES ON A RECOGNIZANCE PROVIDING FOR THE APPEARANCE of the principal at a stated term of court are not absolved from liability on such recognizance by the failure of the state's attorney to take judgment against them at the term stated therein, in the absence of the appearance of the principal. *State v. Plazencia*, 271.
20. CAUSE CAN NOT BE REFERRED UNLESS THERE IS AN ACCOUNT, in the ordinary sense of that term, between the parties, even though there may be many items of damage. *Van Rensselaer v. Jewett*, 750.
21. WHERE PLAINTIFF SUES ON COVENANT IN LEASE RESERVING RENT, payable in grain, fowls, and services, and the defense does not go to the items in the claim, but denies the defendant's liability altogether, there can be no reference. *Id.*
22. DECISION OF CIRCUIT COURT ORDERING A REFERENCE, MAY BE REVIEWED by the supreme court. *Id.*

23. WRITTEN CONTRACT SHOULD, IN PLEADING, BE SET OUT according to its legal effect; but where its true meaning is doubtful, it is best to set it out *in hæc verba*, and leave the court to construe it. *Bayley v. Onondaga Co. Mut. Ins. Co.*, 759.
 24. IN TRESPASS DE BONIS, PLEA THAT THE GOODS BELONGED TO THIRD PERSON, and that the defendant took them by virtue of an attachment against him, gives no color for the action, and is obnoxious to the objection of amounting to the general issue; but if the plea admits that the property was taken from the possession of the plaintiff, it gives color, and will be held good. *Van Etten v. Hurst*, 748.
 25. SPECIAL PLEADER IS NOT ALLOWED TO LEAVE HIS PLEADING OPEN TO DIFFERENT CONSTRUCTIONS, and then take his choice between them. *Id.*
 26. BILL IS NOT DEMURRABLE BECAUSE OF MISJOINDER OF PARTIES, where the defendants, though not all necessary, are not improper parties. *Whittemore v. Coster*, 740.
 27. ORIGINAL BILL TO CORRECT A FORMER DECREE WILL BE SUSTAINED, where the facts set forth are such that it is difficult to divest them of the charge of fraud. *Id.*
- See ACCOUNT; AGENCY, 6; ASSUMPSIT; ATTACHMENTS; BONDS, 2; COSTS; EQUITY, 11, 12; EVIDENCE, 11; FRAUD; INSURANCE—MARINE, 5, 18; JUDGMENTS; MORTGAGES, 5; NEGOTIABLE INSTRUMENTS; NEW TRIAL; PARTNERSHIP, 3; STATUTE OF FRAUDS, 7-9; STATUTE OF LIMITATIONS, 2; SURETSHIP, 10; WARRANTY.

POSSESSION.

See ADVERSE POSSESSION; ATTACHMENTS, 15-17; COMMON CARRIERS, 8; CONTRACTS, 3; FRAUDULENT CONVEYANCES; LANDLORD AND TENANT; LIENS, 3; VENDOR AND VENDEE; WATERCOURSES, 14.

POWERS.

1. ACTUAL EXERCISE OF GENERAL POWER OF APPOINTMENT, by deed or will, converts the appointed estate into assets in equity for the payment of the appointor's creditors, whose claims take preference over those of the appointee, and, upon a bill filed by the creditors, a court of chancery, treating the execution of the power without providing for them as a fraud upon them, will regard the appointor's executor or the appointee as a trustee for the creditors, and subject the estate in his hands to payment of their claims; but the court will not interfere if the power has not been executed and if no act has been done indicating an intent to execute it. *Johnson v. Cushing*, 694.
2. POWER OF APPOINTMENT IS DEEMED GENERAL for the purpose of subjecting the estate, after appointment, to the claims of the appointor's creditors, whenever the donee may appoint to whom he pleases, although he can appoint only by deed or will to take effect at his death, and can not appoint to any use in his life-time. *Id.*

PREFERENCE TO CREDITORS.

See COMPOSITION, 2; FRAUDULENT CONVEYANCES, 2, 4, 5.

PRESENTMENT.

See NEGOTIABLE INSTRUMENTS.

PRESUMPTIONS.

See ADVERSE POSSESSION; CONTRACTS, 2, 5; CRIMINAL LAW, 5; JURY AND JURORS, 2, 3; MARRIED WOMEN, 4; NEGOTIABLE INSTRUMENTS, 30; STATUTES, 3; SURVIVORSHIP, 1, 3; TROVER, 1; WATERCOURSES, 12.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

PROBATE COURT.

See GUARDIAN AND WARD, 1; MARRIED WOMEN, 5.

PROCESS.

1. RETURN OF SERVICE OF A WRIT BY AN OFFICER is, where a return is required by law, the only proper evidence of what has been done by him thereunder, and no omission therein of any fact may be supplied by other proof. *Fairfield v. Paine*, 357.
2. NO INTENDMENT OF THE TIME OF SERVICE IS MADE IN AID OF THE RETURN OF SERVICE.—Of two writs served on the same day, one of which shows the exact time of day when the service was made, the second only the day, the former will be given precedence to the latter, as no intendment can be made that the latter was served before the hour mentioned in the first return of service. *Id.*
3. AMENDMENT TO A RETURN OF SERVICE THAT MAY AFFECT THE RIGHTS OF THIRD PERSONS can only be allowed where something appears of record by which the correction can be made. Thus where one party claims under a writ of execution returned as served at noon of a certain day, an amendment can not be allowed of a writ returned merely as served upon the same day, so as to cause the same to appear as served before the first writ, where nothing appears in the record to indicate the time of service. *Id.*

See ATTACHMENTS, 11, 12; CRIMINAL LAW, 31, 32.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROTEST.

See NEGOTIABLE INSTRUMENTS, 27, 28.

PUBLIC LANDS.

SALE OF IMPROVEMENTS ON PUBLIC LANDS is a valid and sufficient consideration for a promise to pay. *Wilson v. Webster*, 230.

See DEEDS, 4.

QUIET ENJOYMENT.

See **WARRANTY**, 1.

QUO WARRANTO.

WRIT OF QUO WARRANTO IS THE PROPER PROCEEDING to ascertain whether a forfeiture of the charter of a corporation has been incurred. *State v. Real Estate Bank*, 109.

RAILROADS.

See **COMMON CARRIERS**, 9-12.

RAPE.

See **CRIMINAL LAW**, 17.

RATIFICATION.

See **AGENCY**, 5; **CONSTITUTIONAL LAW**, 2.

RECEIVERS.

See **BANKS AND BANKING**, 1.

REFERENCE.

See **PLEADING AND PRACTICE**, 1, 20-22.

RELATION.

See **EXECUTIONS**, 31.

RELEASE.

See **MORTGAGES**, 6; **SURETYSHIP**, 2, 3, 5; **TRUSTS**, 2.

REMAINDERS.

See **WILLS**, 11.

RENT.

See **EXECUTIONS**, 2; **EXECUTORS AND ADMINISTRATORS**, 9; **PLEADING AND PRACTICE**, 21.

REPRESENTATIONS.

See **INSURANCE—FIRE**.

RESCISSION OF CONTRACTS.

PURCHASER TO RESCIND CONTRACT OF SALE must put the vendor, or offer to put him, in the same situation he was in before the delivery of the property. *Hynson v. Dunn*, 100.

See **SALES**, 4.

RETURN.

See **ATTACHMENTS**, 18; **EXECUTIONS**; **PROCESS**.

RIPARIAN PROPRIETORS.

See FLATS; WATERCOURSES.

SALES.

1. **IN ACTION FOR THE PRICE OF GOODS SOLD WITH WARRANTY, FRAUD** may be set up, under the general issue, though the fraud consisted in representations as to the quality of the goods, which were not covered by the warranty. *President of Connersville v. Wadleigh*, 214.
 2. **WILLFUL MISREPRESENTATION OF QUALITY IS NOT SUFFICIENT** to avoid a sale of personal property, unless the defendant was deceived by it, and unless it formed an inducement to him to make the purchase. *Id.*
 3. **EXPRESS WARRANTY WILL NOT REACH OPEN VISIBLE DEFECTS OR QUALITIES** of goods sold, whose existence is clear to the buyer, though they are inconsistent with its terms. Thus though a fire-engine is warranted to be equally efficacious with others larger and more costly, whereas its inferiority is patent to every ordinary observer, there is no breach of warranty. *Id.*
 4. **VENDOR MAY TREAT AS VOID A SALE** made to one who purchases with a preconceived design not to pay for the goods bought. *Thompson v. Rice*, 121.
 5. **DELIVERY IS A FACT DEPENDENT UPON INTENTION**, and must be determined by the jury from a consideration of the whole evidence. *Byer v. Mayre*, 410.
- See DAMAGES, 2; EXECUTIONS; EXECUTORS AND ADMINISTRATORS; FRAUD; FRAUDULENT CONVEYANCES; RESCISSION OF CONTRACTS.**

SAVINGS BANKS.

See BANKS AND BANKING.

SEAWORTHINESS.

See INSURANCE—MARINE.

SEPARATE ESTATE.

See MARRIAGE AND DIVORCE.

SET-OFF.

See AGENCY, 1; NEGOTIABLE INSTRUMENTS, 20.

SHERIFFS.

SHERIFF IS LIABLE FOR ACTS OF HIS DEPUTY in attaching property. *King v. Chase*, 675.

See EXECUTIONS; JUDGMENTS, 5; STATUTE OF FRAUDS, 4-8.

SLANDER.

2. **WHERE THE SPEAKING OF SLANDEROUS WORDS IS PROVED**, the law implies that they were false, and spoken maliciously, and this inference must be overcome by the defendant by countervailing proof. *Byrket v. Monahan*, 212.

2. **PERJURY.**—THE GENERAL CHARACTER OF PLAINTIFF for truth and integrity may be considered by the jury in an action of slander, where the slanderous words charge perjury, and defendant pleads the truth of the charge, if this defense has been doubtfully sustained. *Id.*
3. **IDEM**—THE DEFENDANT TO AN ACTION OF SLANDER CAN PROVE THE TRUTH of a charge of perjury only by two witnesses, or by one witness and strong corroborating circumstances. The defendant is held to the same proof that is required of the people on the trial of an indictment for perjury. *Id.*
4. **PLEA OF JUSTIFICATION TO AN ACTION OF SLANDER** can not be considered in aggravation of damages, if the evidence introduced in its support shows that defendant had reason to believe the charge true. What would be the rule if the evidence in support of the plea were offered, not determined. *Id.*
5. **PLAINTIFF IN ACTION OF SLANDER MAY SHOW REPETITION** of the actionable words, although there be but one count in the declaration; but he will not be allowed, in doing so, to prove any words that might be the subject of another action. *Root v. Lowndes*, 762.

See FRAUDULENT CONVEYANCES, 2.

SLAVERY.

See MORTGAGES, 2.

SOVEREIGNTY.

See TAXATION.

SPECIFIC PERFORMANCE.

See CORPORATIONS, 19; INDEMNITY, 2.

STATUTE OF FRAUDS.

1. **PROVISION OF THE STATUTE OF FRAUDS, PROVIDING THAT NO ACTION SHALL BE BROUGHT** upon any agreement that is not to be performed within one year, unless the same or a memorandum thereof is in writing, signed by the party to be charged, extends only to agreements which, by the express stipulation of the parties, are not to be performed within such time, and not to agreements which may probably not be performed within a year. *Lapham v. Whipple*, 487.
2. **AGREEMENT OF A VENDOR, UPON THE SALE OF A PATENT RIGHT**, to repay the consideration, if the vendee did not, within three years, realize a certain amount out of the profits of such patent right, can not be performed within a year from the time it was made, and is within the provisions of the statute of frauds requiring such agreements to be in writing. *Id.*
3. **PROMISE TO INDEMNIFY ANOTHER FOR DOING A PARTICULAR ACT** is an original undertaking, and not within the statute of frauds. *Marcy v. Ormsford*, 158.
4. **SALES OF LANDS BY SHERIFF UNDER EXECUTIONS** are within the statute of frauds. *Robinson v. Garth*, 47.
5. **MEMORANDUM OF SHERIFF, LIKE THAT OF AN AUCTIONEER**, made at the time of the sale, binds the purchaser, he being the agent of both parties. *Id.*

6. SHERIFF CAN NOT INTRODUCE HIS OWN MEMORANDUM OF SALE, to take it out of the statute of frauds, when suing purchaser at an execution sale for breach of his contract. The sheriff is incompetent by reason of being a party to the record: *aliter* if the suit is brought by the plaintiff in execution. *Id.*
7. DEFENSE OF STATUTE OF FRAUDS MUST BE SPECIALLY INSISTED ON in the pleadings in a suit in equity, or it will be deemed waived. *Tarleton v. Viles*, 193.
8. COMPLAINANT IN EQUITY RELYING ON STATUTE OF FRAUDS to defeat a defense set up in the answer, could formerly do so by a special replication, but that form of pleading is now disused, and he must now take advantage of the statute by amending his bill, so as to anticipate and avoid the defense. *Id.*
9. GENERAL REPLICATION WAIVES BENEFIT OF STATUTE OF FRAUDS as a defense against an agreement set up in the answer. *Id.*
10. ACTION AT LAW CAN NOT BE MAINTAINED FOR THE PURCHASE MONEY OF LAND, there being no note or memorandum of the sale, although the vendee received and retains possession. *Johnson v. Hanson*, 54.

See FRAUDULENT CONVEYANCES, 3.

STATUTE OF LIMITATIONS.

1. PROMISE TO PAY A DEBT BARRED BY THE STATUTE OF LIMITATIONS must be unconditional, or there must be such an unqualified admission of present indebtedness, from which such promise can be inferred, in order to take such debt out of the operation of the statute. *Mumford v. Freeman*, 532.
 2. STATUTE OF LIMITATIONS IS UNAVAILABLE ON DEMURRER; it must be pleaded though it appear on the face of the declaration that the cause of action did not accrue within the time provided by law, within which the action must be brought. *Sleeth v. Murphy*, 232.
 3. STATUTE OF LIMITATIONS THAT GOVERNS IS THAT IN FORCE AT THE TIME of the plea thereof; and though at the time that the action is brought it is barred by the provisions of the existing statute, the plea thereof is unavailing, if subsequently, before any plea is interposed, the time of limitation is extended so as to take the case out of the statute. *Id.*
 4. DEBTOR IS NOT "WITHOUT THIS STATE," within the meaning of the Connecticut statute of limitations, where, being a citizen of, domiciled, and resident within that state, with his family, he temporarily, for business purposes, goes to another state and remains there for eight months at a time on two separate occasions; and, therefore, the time of such absences is not to be excluded in computing the time limited for the commencement of a suit against him. *WILLIAMS, C. J., contra. Sage v. Hawley*, 128.
 5. DECREE MAY BE FINAL SO AS TO SUSTAIN A WRIT OF ERROR; yet while the cause remains on the docket for any purpose, the statute barring writs of error does not begin to run. *Bank of Mobile v. Hall*, 41.
- See BANKRUPTCY AND INSOLVENCY, 1; LANDLORD AND TENANT, 2.

STATUTES.

1. LAWS SHOULD NEVER BE CONSTRUED SO AS TO OPERATE RETROSPECTIVELY, unless the legislature have, in express terms, so expressed their intention. *Oyon's Succession*, 274.

2. **STATUTE USING WORD WHOSE MEANING IS WELL KNOWN**, and has a definite sense at common law, the word shall be expounded according and restricted to that sense. *Buckner v. R. E. Bank*, 105.
3. **WHERE PENALTY FOR ANY OMISSION IS FIXED BY STATUTE** creating the corporation, the penalty is the only punishment that can be inflicted, and the omission is no cause of forfeiture; the presumption is that the legislature intended the penalty as a satisfaction for the breach. *State v. R. E. Bank*, 109.
- See **CONSTITUTIONAL LAW**, 1, 4; **EQUITY**, 2, 4; **ESTATES OF DECEASED PERSONS**; **EXECUTORS AND ADMINISTRATORS**, 5, 10; **FRANCHISES**, 2; **INHERITANCE**, 4; **WILLS**, 3.

STOCKHOLDERS.

See **CORPORATIONS**, 1.

STREETS.

See **CORPORATIONS**, 22, 23.

SUBROGATION.

See **SURETYSHIP**, 1.

SUCCESSION.

See **TAXATION**, 5; **WILLS**, 6.

SURETYSHIP.

1. **SURETY IS ENTITLED TO APPROPRIATION OF COLLATERAL SECURITY**, held by the creditor for the same debt, to the payment thereof, or to have it retained for his benefit and to be subrogated to the creditor's right thereto if he pays the debt. *N. H. Savings Bank v. Colcord*, 685.
2. **SURETY IS DISCHARGED BY CREDITOR'S SURRENDER OF COLLATERAL SECURITY** held for the same debt, either *pro tanto* or entirely according to the value of the security, if surrendered without his consent, but not otherwise; nor is such discharge obviated by the creditor's taking additional sureties in lieu of the security so surrendered. *Id.*
3. **SURETY IS RELEASED BY CREDITOR'S ACCEPTING INTEREST IN ADVANCE** beyond the day of payment from the principal debtor without the surety's assent, there being no evidence of any reservation of a right to sue, such acceptance of interest being evidence of a contract to delay. *Id.*
4. **NEW PROMISE BY SURETY, AFTER DISCHARGE, IN CONSIDERATION OF FORBEARANCE** for a definite term, to be holden for a longer period, is binding and waives the discharge, though he had no knowledge of the matters discharging him, if there has been no fraudulent concealment, and if the principal was still liable when the new promise was made. *Id.*
5. **SURETY OF PRINCIPAL TO REFUND ADVANCES, CAN NOT COMPEL A FACTOR** to assert his lien upon the goods or money of the principal, before proceeding against him personally. *Martin v. Pope*, 66.
6. **INDULGENCE, NOT FOUNDED UPON A VALUABLE CONSIDERATION**, given to a principal, will not discharge a surety. *Id.*
7. **PARTICIPATION OF SURETY IN PAYMENTS OF INTEREST IN ADVANCE** furnishes evidence of his assent to the agreement for delay implied from such payment. *N. H. Savings Bank v. Colcord*, 685.

8. **NEW PROMISE BY SURETY AFTER DISCHARGE, WITH KNOWLEDGE** of the facts discharging him, is binding without any new consideration; otherwise, if he has no such knowledge. *Id.*
 9. **IT IS NO DEFENSE TO A SURETY FOR A CORPORATION** that the obligation of the latter is beyond its powers; his liability remains notwithstanding, if default is made by his principal. *Gist v. Drabely*, 426.
 10. **ALLEGATION IN DECLARATION THAT CONSIDERATION FOR GUARANTY** to pay an overdue promissory note twelve months from the date of the guaranty, was an agreement to forbear for a reasonable time, is sustained by proof that the agreement was to forbear for some time, without naming any specific time. The legal construction of such an agreement is, that the forbearance should be for a reasonable time. *Ellison v. Johnson*, 141.
 11. **WHERE ONE GUARANTEES ABSOLUTELY TO PAY THE NOTE OF ANOTHER** at a specified time, which time is after it becomes payable by the maker, no demand of the maker or notice to the guarantor is necessary, in order to make the latter liable on his guaranty. *Cooper v. Page*, 371.
 12. **WHERE ONE, IN CONSIDERATION OF A CERTAIN SUM OF MONEY, GUARANTEES** the payment of a note for a larger amount, and the guaranty is broken, the damages recoverable, in an action against him on his guaranty, are the amount due on the note guaranteed. *Id.*
- See ATTACHMENTS, 5-7; EVIDENCE, 13; PLEADING AND PRACTICE, 19.

SURVEY.

ALLOWANCE TO BE MADE FOR THE VARIATION OF THE COMPASS, and whether any allowance should be made to determine the location of a survey, are questions of fact for the determination of the jury. *Harlan v. Brown*, 436.

SURVIVORSHIP.

1. **PRESUMPTIONS OF SURVIVORSHIP, WHICH PREVAIL AT THE CIVIL LAW** where death ensues in a common disaster, have no sanction in our system of jurisprudence, either as a principle of the common law, or by statutory enactment. *Coye v. Leach*, 518.
2. **DIFFERITY OF AGE MAY BE CONSIDERED IN DETERMINING THE QUESTION OF SURVIVORSHIP**, as between an adult and an infant, or a person well stricken in years. *Id.*
3. **NO PRESUMPTION OF SURVIVORSHIP EXISTS**, as between a father, seventy years of age, and his daughter thirty-three years of age, each of whom perished in the same disaster. In the absence of all evidence of survivorship in such case, the presumption is that the death of each occurred at the same instant. *Id.*

SYNDIOS.

See ATTACHMENTS, 6-8.

TAXATION.

1. **STATE HAS AN UNDOUBTED POWER TO TAX PERSONS** and property within its limits, and it may delegate such power to a civil corporation, so far as it may be necessary for the good government of the corporation. *Harrison v. Mayor*, 633.
 2. **GRANT OF THING INCLUDES MEANS NECESSARY TO ACCOMPLISH THE END.** Hence, where the legislature gives a municipal corporation power to levy
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- an *ad valorem* tax, it is competent for the corporate authorities to provide a penalty for a violation of the ordinance imposing the tax. *Id.*
3. LAWS ARE NOT IN RESTRAINT OF TRADE which merely impose taxes on the sales of merchandise. *Id.*
 4. ORDINANCE IS NOT IN VIOLATION OF THE CONSTITUTION that levies an *ad valorem* tax on all flatboats wherein goods may be sold on retail, though the flatboat may have brought goods from another state. Such a tax is not an "import or duty" within the meaning of the constitution of the United States; and it is probable that the prohibition in the tenth section of the first article applies only to foreign imports. *Id.*
 5. ACT OF 1842, IMPOSING A TAX OF TEN PER CENT. upon the inheritance, devise, or legacy received by an alien, applies only to successions subsequent to the passage of such act. *Oyon's Succession*, 274.
 6. RIGHT TO LEVY WHARFAGE UPON PERSONAL PROPERTY IN TRANSIT THROUGH THE CITY, and not belonging to residents, is not given by a grant of "power to raise by tax, upon the real and personal estate within the city, such sums as may be necessary," etc. *Worsley v. Second Municipality of N. O.*, 333.
 7. GRANT OF POWER TO A CITY TO CONSTRUCT AND REGULATE WHARVES GIVES BY IMPLICATION the power to levy a tax upon goods and merchandise landed and shipped at them. *Id.*

See CONSTITUTIONAL LAW, 5; WHEARERS, 2.

TENANTS AT WILL.

See VENDOR AND VENDEE.

TENANTS IN COMMON.

See CO-TENANTY.

TENDER.

1. MONEY TENDERED IN PAYMENT OF A DEBT does not, unless accepted, discharge the debtor, or vest title to the same in the creditor. *Stowell v. Read*, 714.
2. TENDER IN PAYMENT OF A DEBT PREVENTS THE RECOVERY OF COSTS in an action to enforce the demand. *Id.*

TRESPASS.

1. TRESPASS MAY BE MAINTAINED ON ACCOUNT OF DAMAGE committed by cattle agisted, either against the owner or the agister, although but one satisfaction can be obtained. The rule of the common law in this respect has not been changed by the revised statutes, c. 113, sec. 4. *Sheridan v. Bean*, 507.
 2. RELEASE OF ONE OF SEVERAL JOINT TRESPASSERS DISCHARGES ALL OF THEM. *Gilpatrick v. Hunter*, 370.
- See CORPORATIONS, 21; EXERCUTIONS, 12; HUSBAND AND WIFE, 6; INDEMNITY, 6; PLEADING AND PRACTICE, 24; WATERCOURSES, 12.

TROVER.

1. SEIZURE OF GOODS BY OFFICER IS NOT TORTIOUS, where he takes them under regular process in favor of a creditor of a fraudulent vendee, and

therefore the vendor, to enable him to maintain trover therefor against the officer, must make demand upon him; but if, demand being made, the officer refuses to deliver them without requiring any evidence of the title of the person making the demand, he will be presumed to have waived his claim to such information. *Thompson v. Rose*, 121.

2. REFUSAL TO DELIVER GOODS IS PRIMA FACIE EVIDENCE OF CONVERSION thereof, where a demand has been duly made. *Id.*
3. OFFICER MAY PAY OFF LIEN OF COMMON CARRIER FOR FREIGHT on goods, in order to get possession of them, and upon doing so will stand in the place and have the rights of such carrier. But if, upon demand being made upon him by a claimant of said goods, he sets up no claim of lien, but makes an unqualified refusal, he will not be allowed afterwards to set up such lien as a defense, in an action of trover for the goods. *Id.*
4. JUDGMENT AND VERDICT IN TROVER ARE CONCLUSIVE AS TO TITLE to the goods claimed in another action for the same goods, where it is shown by parol that the question of title was the only matter in issue before the jury. *King v. Chase*, 675.

See COMMON CARRIERS, 8, 14; CO-TENANCY, 5; JUDGMENTS, 7.

TRUSTS AND TRUSTEES.

See EXECUTORS AND ADMINISTRATORS, 7.

USAGE.

See INSURANCE—MARINE, 16.

USURY.

See EVIDENCE, 14.

VENDOR AND VENDEE.

ONE WHO ENTERS UPON LAND UNDER A CONTRACT OF SALE IS BUT A TENANT AT WILL, until the execution of the conveyance, and though he may have paid the purchase money, his tenancy may be determined by a demand for the possession, and if this be refused, the possession may be recovered in an action of ejectment. *Doe v. Brown*, 217.

See EQUITY, 3; LIENS, 5-10; STATUTE OF LIMITATIONS, 10; WARRANTY, 1.

VENUE.

See CRIMINAL LAW, 27, 29.

VERDICT.

See BONDS, 2; CRIMINAL LAW, 10, 11, 23, 45; EVIDENCE, 15; TROVER, 4.

WARRANTS.

See MALICIOUS PROSECUTION, 1.

WARRANTY.

1. ACTION CAN NOT BE MAINTAINED FOR BREACH OF WARRANTY, whether express or implied, unless there has been a recovery by the real owner. It is necessary in such a case for the pleading to show that the vendee

has been evicted or lawfully deprived of the use and possession of the property. *Hynson v. Dunn*, 100.

2. GENERAL COVENANT OF WARRANTY OF TITLE IN ALABAMA is in effect only a covenant for quiet enjoyment. *Caldwell v. Kirkpatrick*, 36.
3. TO CONSTITUTE A BREACH OF WARRANTY OF TITLE IT IS NOT NECESSARY that there be an actual expulsion; the covenant secures a legal entry as well as the enjoyment of the lands. *Id.*

See INSURANCE—MARINE, 2, 4, 8; SALES, 1, 2.

WATERCOURSES.

1. RIPARIAN PROPRIETORS HAVE A RIGHT TO THE USE AND ENJOYMENT of the stream as it passes through their land, but as this right is common to all through whose land the stream flows, no one proprietor can wholly destroy or divert it, either by preventing the water from flowing to a lower proprietor, or by throwing it back upon the mills or lands of one above. *Cary v. Daniels*, 532.
2. RIPARIAN PROPRIETOR, WHO FIRST ERECTS HIS DAM for reasonable mill purposes, has a right to maintain it as against proprietors above and below, although by so doing the proprietor above is prevented from placing a dam and mill on his land. In such case prior occupancy gives a prior right to such use. *Id.*
3. RIPARIAN PROPRIETOR, WHO ERECTS A DAM AND MILL FOR THE PURPOSE of using the surplus water discharged from the mill of another proprietor first located, is, as to such surplus, the first appropriator, and will be protected in the prior use thereof against the acts of the proprietor who first erected his mill. *Id.*
4. RIGHT TO THE USE AND POWER OF FLOWING WATER MAY BE ACQUIRED by grant from the proprietor in whom it is vested, or by such an exclusive, adverse, and continued enjoyment as is in law regarded as evidence of a grant. *Id.*
5. RIGHT TO THE USE OF THE FLOW AND FALL OF THE WATER on the land of the proprietor is not an easement; it is inseparably connected with and inherent in the land, is parcel of the inheritance, and passes with it. *Id.*
6. RIGHT TO THE USE OF WATER BELOW CERTAIN GRANTED PREMISES, in accordance with an appropriation previously made, is not an incumbrance within the meaning of a covenant against incumbrances, but a parcel of such lower estate. *Id.*
7. PRIOR APPROPRIATOR, WHO REMOVES HIS DAM LOWER DOWN THE STREAM, is not liable to another and subsequent appropriator, provided no larger appropriation of the stream is made than existed before. *Id.*
8. TO PROVE DAMAGE FROM DIVERSION OF WATERCOURSE a plaintiff suing therefor may introduce evidence of the cost of constructing the defendant's mill on the same stream, and of the yearly rent of the mill, to show at what expense he, the plaintiff, might make the water available. *Plumleigh v. Dawson*, 199.
9. RIPARIAN PROPRIETOR HAS RIGHT TO USE OF STREAM flowing through his land for culinary, agricultural, and hydraulic purposes without abatement, diminution, or alteration, except from detention for lawful purposes by other proprietors above him. *Id.*

10. DIVERSION OF WATERCOURSE by a riparian proprietor, without returning it to its natural channel before reaching the land of a proprietor below, is unlawful and subjects the wrong-doer to an action for damages by the lower proprietor. *Id.*
11. PROPERTY IN STREAM IS INDIVISIBLE, each proprietor being entitled to the use of the whole of it as it flows through his land, and one proprietor can not appropriate a specific portion of it to his use to the exclusion of those below him. *Id.*
12. DAMAGE IS PRESUMED FROM A DIVERSION OF A STREAM. *Id.*
13. PRIVILEGE OF CONSTRUCTING A DAM AND MILL-RACE IS A FRANCHISE, but after such construction the dam and race become property, for the destruction of which trespass will lie. *Conwell v. Brookhart, 244.*
14. RIGHT TO CONSTRUCT A DAM ON THE LAND OF ANOTHER, implies the right to the exclusive use and possession of as much land as may be necessary for such purpose. *Id.*
15. GRANTEE OF THE PRIVILEGE OF LOCATING A MILL DAM and constructing a race for the purpose of supplying his mill with water, having once selected his site and erected his dam, is not restricted to such location if it afterwards turns out to be impracticable for the purposes intended. *Id.*

See FLATS; LICKENS, 2.

WHAERVES.

See CONSTITUTIONAL LAW, 5; CORPORATIONS, 24; TAXATION, 6, 7.

WILLS.

1. FEE PASSES BY DEVISE ON CONDITION THAT DEVISEE SHALL PAY DEBTS of the testator. *Ball v. Scammon, 706.*
2. FEE PASSES BY DEVISE OF "ALL THE ESTATE," real and personal, of the testator. *Id.*
3. LIMITATION OVER UPON INDEFINITE FAILURE OF ISSUE of the first taker is void as an executory devise, because too remote. *Id.*
4. LIMITATION OVER UPON FAILURE OF ISSUE RESTRAINED TO ISSUE LIVING at the death of the first taker, is a good executory devise; as where there is a limitation over if the first taker "should die before he arrives to the age of twenty-seven years and have no male issue," and part of the estate limited over is given to the "heirs" of such taker. *Id.*
5. SOURCE FROM WHICH ESTATE WAS DERIVED IS NOT REGARDED in New Hampshire in determining who shall inherit it, unless the statute makes that fact material. *Id.*
6. DESCENT OF ESTATE OF DECEDENT IS GOVERNED BY STATUTE EXISTING at his death, and a statute regulating the descent of a "deceased child's share in the estate" of a decedent will not govern the descent of property taken by a child under his father's will, where the father died before the statute and the child afterwards, but the child will be regarded as a new stock of descent. *Id.*
7. WILL CAN NOT DISPOSE OF REAL ESTATE acquired after the date of its execution, however clearly expressed the intention of the testator, unless there is republication of the will. *Beall v. Schley, 415.*
8. DOCTRINE OF ELECTION APPLIES as well against the heirs of the testator as against other persons. *Id.*

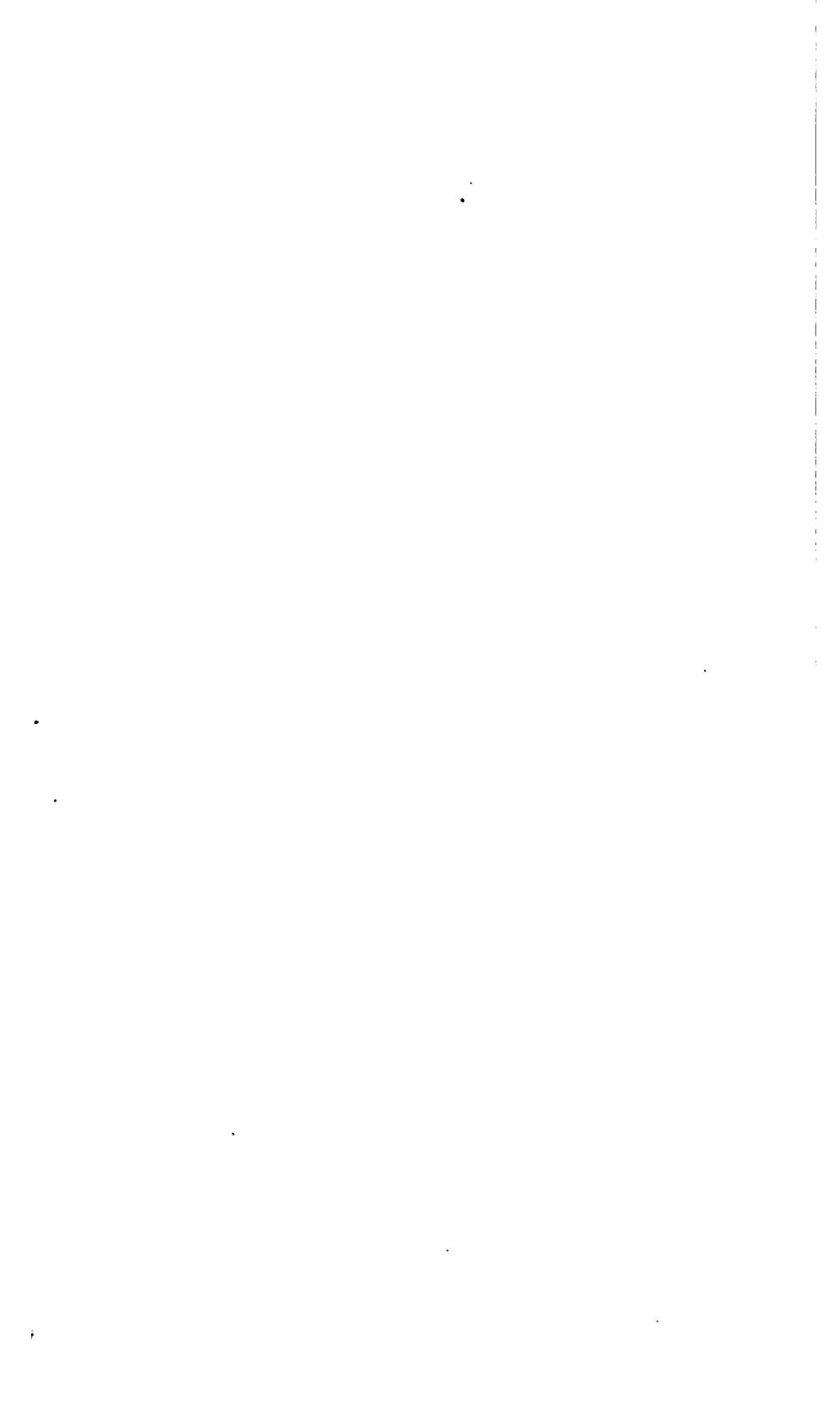
9. **IDEM**—**CLAUSE IN A WILL INTENDED TO PASS AFTER-ACQUIRED REAL ESTATE** raises a case of election, and requires the testator's heirs either to renounce the benefits conferred by the will, or else their right in such after-acquired estate, in favor of the intended devisee. *Id.*
10. **PRINCIPLE OF ELECTION** REQUIRES that no person claiming under an instrument shall be allowed to defeat its provisions. *Id.*
11. **IDEM**—**ELECTION BY HEIR TO TAKE AS HEIR, AND CONSEQUENT WAIVER** of a life estate given to him by the will, does not in any manner affect the estates of the remainder-men, and they will take in the same manner as if he had elected to take his life estate under the will. *Id.*
12. **LEGATEE MAY SUE FOR AND RECOVER AT LAW THE LEGACY BEQUEATHED HIM**, without showing the assent of the executor to such legacy, in Mississippi, by statutory provision. *Worton v. Howard*, 607.
13. **INTEREST OF LEGATEES IS VESTED AND ASSIGNABLE** where the testator bequeaths them certain stock, "to remain unsold," and the dividend from it to be equally divided among them. *Manning v. Craig*, 739.
14. **CHANCERY WILL AID IN CARRYING OUT TESTATOR'S INTENT**, and, to save the fund from loss or great depreciation, may change its mode of enjoyment. *Id.*

See **MARRIED WOMEN**, 5; **TAXATION**, 5.

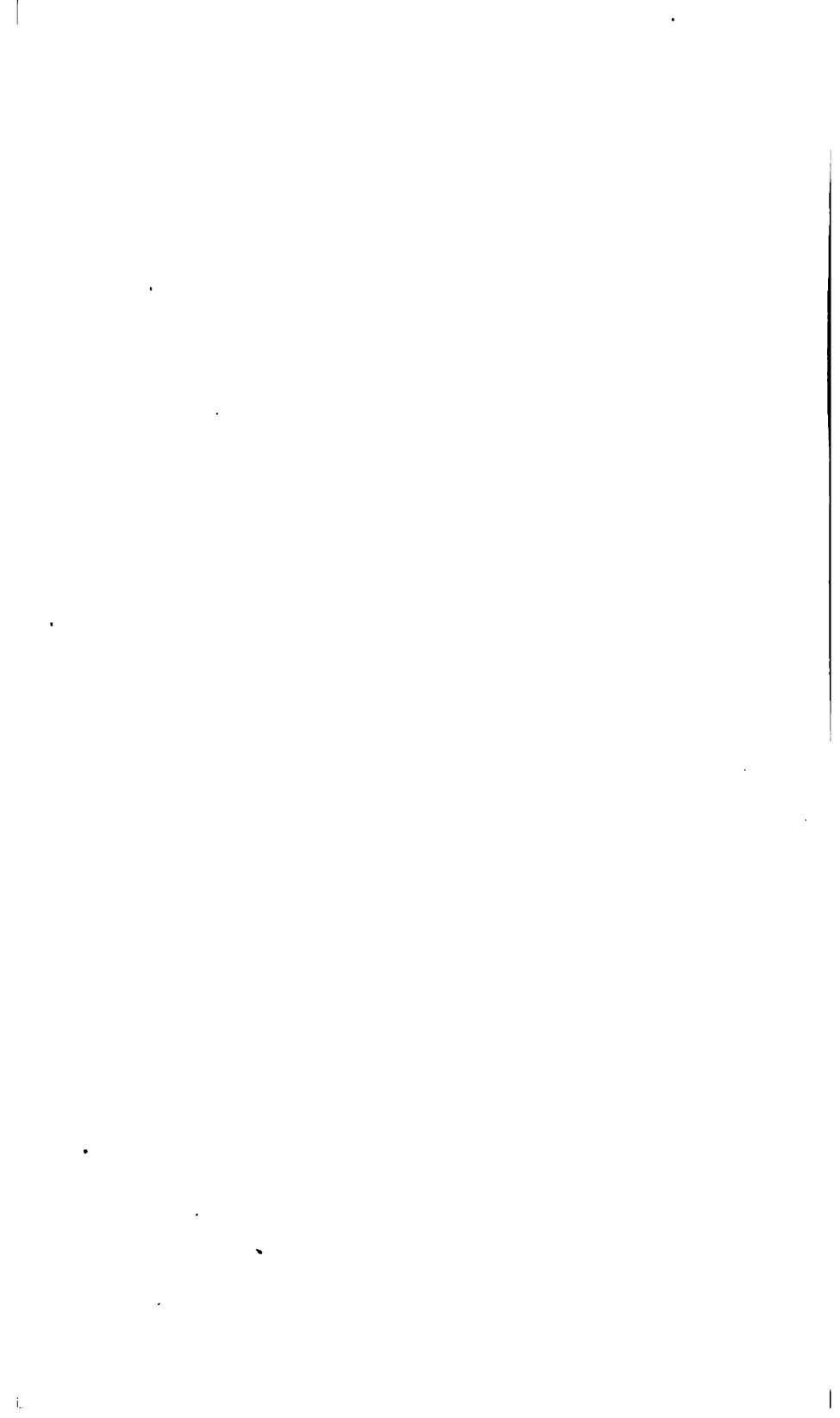
WITNESSES.

1. **WITNESS IS INCOMPETENT WHO HAS BEEN CONVICTED** of receiving stolen goods knowing them to have been stolen. *Commonwealth v. Rogers*, 458.
2. **TREASURER OF A TOWN IS A COMPETENT WITNESS** in an action by the town against a tax collector to recover the amount of taxes collected by him, to prove that the witness in his office of treasurer gave the defendant a receipt for more than the sum which he had actually paid in or accounted for as collector. *Town of Grafton v. Follansbee*, 736.
3. **WITNESS HAVING TESTIFIED TO A CONVERSATION**, can not testify as to what he understood to be meant by the language used. *Hibbard v. Russell*, 732.

See **CRIMINAL LAW**, 31, 32; **INSANEITY**; **SLANDER**, 2.



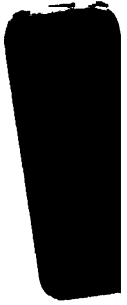




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